

MT LEGISLATIVE HISTORY

Chapter 658 1989

Bill (H) 707 S _____

Original bill & hist. C

H. Committee on Natural Resources

S. Committee on Agriculture, Livestock + Irrigation

Hearing Date(s) Feb 17 ☒ C

Hearing Date(s) Mar 15 ☒ C

_____ ☐ C

Mar 20 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Date Out Feb 17 ☒ C

Mar 20 ☒ C

Did this bill originate in an interim committee? Yes No

Committee _____

Report _____

Free Conference Committee

Apr 20 ☒ C

Note: The following testimony is identical
in both the House and Senate Minutes.
Therefore, they are only copied once.

① Questions and Answers on the Instream Flow
Leasing Bill

② William A. Shields

③ DNRC

④ Dave McClure

HOUSE FINAL STATUS

3/09	2ND READING CONCURRED	49	0
3/11	3RD READING CONCURRED	44	0

RETURNED TO HOUSE
 3/17 SIGNED BY SPEAKER
 3/17 SIGNED BY PRESIDENT
 3/18 TRANSMITTED TO GOVERNOR
 3/23 SIGNED BY GOVERNOR
 CHAPTER NUMBER 285 EFFECTIVE DATE: 10/01/89

HB 707 INTRODUCED BY IVERSON, ET AL.
 ALLOW LEASING FOR INSTREAM PURPOSES BY FISH,
 WILDLIFE, AND PARKS
 BY REQUEST OF GOVERNOR

2/14	INTRODUCED		
2/15	REFERRED TO NATURAL RESOURCES		
2/16	FISCAL NOTE REQUESTED		
2/17	HEARING		
2/18	COMMITTEE REPORT--BILL PASSED AS AMENDED		
2/20	FISCAL NOTE RECEIVED		
2/21	FISCAL NOTE PRINTED		
2/21	2ND READING PASSED AS AMENDED	64	35
2/22	3RD READING PASSED	63	34

	TRANSMITTED TO SENATE		
2/28	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.		
3/15	HEARING		
3/21	COMMITTEE REPORT--BILL CONCURRED AS AMENDED		
3/23	2ND READING CONCUR MOTION FAILED	21	27
3/23	2ND READING INDEFINITELY POSTPONED (BILL RETURNED TO HOUSE)	29	19
4/11	RECONSIDERED PREVIOUS ACTION TO INDEFINITELY POSTPONE	33	16
4/13	REQUESTED HOUSE TO RETURN BILL (BILL RETURNED TO SENATE)		
4/14	2ND READING CONCURRED AS AMENDED	28	20
4/17	3RD READING CONCURRED	28	21

	RETURNED TO HOUSE WITH AMENDMENTS		
4/19	2ND READING AMENDMENTS NOT CONCURRED	64	31
4/19	FREE CONFERENCE COMMITTEE APPOINTED		
4/20	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/20	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	61	35
4/20	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	58	35

	SENATE		
4/19	FREE CONFERENCE COMMITTEE APPOINTED		
4/20	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/20	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	30	17
4/20	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	32	18

4/27	SIGNED BY PRESIDENT
4/28	SIGNED BY SPEAKER
4/28	TRANSMITTED TO GOVERNOR
5/11	SIGNED BY GOVERNOR

Stan Bradshaw urged support for the bill.

Testifying Opponents and Who They Represent:

None

Opponent Testimony:

None

Questions From Committee Members: None

Closing by Sponsor: REP. GRADY closed, stating that it was a good bill, and showed a willingness on the part of the state to work with small miners, to help them to protect themselves and Montana too.

DISPOSITION OF HB 679

Motion: REP. O'KEEFE moved the bill.

Discussion: None

Amendments, Discussion, and Votes: REP. O'KEEFE moved the amendments as proposed in the gray bill. The motion CARRIED unanimously.

Recommendation and Vote: REP. KADAS moved that the bill DO PASS AS AMENDED and the motion CARRIED.

HEARING ON HB 707

Presentation and Opening Statement by Sponsor:

REP. IVERSON, House District 12, distributed 3 exhibits, an explanation of the bill, a supplement, and a Statement of Intent (EXHIBITS 14, 15 and 16). He stated that the bill was a conservative pilot program which addressed the leasing of existing water rights for the purpose of enhancing or maintaining streamflows. He said that the Board of Natural Resources could choose up to 10 streams or reaches, on the basis of critical need for water, where leasing would be likely to enhance the fishery. He said that the Dept. of Fish, Wildlife & Parks could negotiate with the water right holder, and the contract thus arrived at would have to specify exactly which portion of the stream the water was intended to be in, and a specific measurement plan.

REP. IVERSON said that the only water that could be leased would be water that had been historically consumed. He said that the bill would not confiscate anybody's water, would not adversely affect other water users, would not force anybody

to do anything he/she didn't want to do and was not a radical change in water policy. The problem he sought to address was that if water for which you held the right were left in the creek, the water right could be lost. He stated that the legislation would expand the property rights of water rights holders, and would allow for compensation for the exchange in the use of property.

Testifying Proponents and Who They Represent:

Glenn Marx, Governor's Office
Lorents Grosfield, Montana Board of Natural Resources
Karen Barclay, Director, Dept. of Natural Resources and Conservation
Peggy Haaglund, Montana Association of Conservation Districts
George Ochenski, Alliance for Montana Water
Ron Marcoux, Montana Dept. of Fish, Wildlife and Parks
Stan Bradshaw, Montana Council of Trout Unlimited
Paul Roos, Fishing and Floating Outfitters Association of Montana
Jack Salmond, Western Environmental Trade Association (WETA)
Chris Hunter, Montana Chapter, American Fisheries Society
Janet Ellis, Montana Audubon Legislative Fund
Jim Jensen, Montana Environmental Information Center
Rep. Ed Grady, House District 47

Proponent Testimony:

Glen Marx spoke in favor of the bill as a positive move for agriculture, the backbone of Montana's economy. He said that it was a reasonable bill and represented a cooperative effort regarding water rights leasing that would not allow for confiscation of water rights.

Lorents Grosfield said that the Board of Natural Resources had met the week previous, and had approved the instream flow protection portion of the State Water Plan. Mr. Grosfield read from that portion, which was in agreement with the intent and provisions of the legislation. He also introduced into the record a letter in support of the legislation from the Chairman of the Board of Natural Resources, and a letter from a member of the Board, Mr. Terry Anderson, also in support of HB 707 (EXHIBITS 17 & 18). Mr. Grosfield supported the addition of the Statement of Intent, and indicated that he would support other language regarding "perceived adverse effects to other users", and also language to ensure consistency with the State Water Plan, especially with regards to leasing "during critical low flow periods".

Peggy Haaglund spoke in favor of the legislation (EXHIBIT 20).

George Ochenski stated that his organization had worked long and hard to handle every possible objection brought to them regarding water leasing, and felt that those objections had been answered in this legislation.

Ron Marcoux testified for HB 707 as set forth in EXHIBIT 21.

Stan Bradshaw said that the bill added one more tool with which the state could address problems with water shortages.

Paul Roos stated that HB 707 was a positive step towards helping tourism without adversely affecting anyone.

Jack Salmond stated that although his organization, WETA, had been historically against water leasing, and although their membership was still not totally comfortable with the concept, they stood in support of this bill in light of recent factors, namely drought conditions and widespread impacts of water shortages. He expressed concern that as this bill moved through the process, the interest of the private landowner would not be compromised.

Chris Hunter testified in favor of the bill (EXHIBIT 22), and suggested some provisions for strengthening the bill, in particular with regards to off stream rights, and the limitation on number of reaches or streams.

Janet Ellis testified in support of HB 707 (EXHIBIT 23).

Jim Jensen said that the bill would prevent the acrimony that had developed the summer before with the adverse impacts of water shortages due to continued drought.

Rep. Ed Grady testified in support of HB 707 and the State Water Plan, stating that it was 20 years too late. He said that he was aware that ranchers had some fear about the legislation, but reminded the committee that water was often wasted because of the fear of letting it go down stream. He stated that the bill could benefit agriculture, allowing for better management of a scarce resource.

Testifying Opponents and Who They Represent:

Rep. Chuck Swysgood, House District 73
Ron Waterman, Montana Stockgrowers Association, Montana
Cattlemens Association, Montana Association of State
Grazing Districts, and the Agricultural Protective
Association

Dave McClure, Montana Farm Bureau and self
Jo Brunner, Montana Water Resources Association
Walter Malone, Teton Water Users Association and self
Rep. Vernon Westlake, House District 76
Kay Norinberg, Women Involved in Farm Economics (WIFE)
Rep. Bernie Swift, House District 64
Rep. Francis Koehnke, House District 32
Bob Saunders, White Sulphur Springs

Opponent Testimony:

Rep. Swysgood said that he was not as opposed to the leasing option itself as he was to the tool being used. He said that this was one option that agriculture could not live with in the water plan. He stated that agriculture had fear, because water was a precious commodity. The problems he had were: 1) There were adverse effects on agriculture and on off stream supply; 2) The only reason this bill was here was because of the drought; 3) He was concerned about the measurement methods being determined by the rule making authority of FWP and the cost; 4) The words "pilot project" were not contained in the bill; and 5) The bill substantially changed water law.

Ron Waterman spoke in opposition to Hb 707 as set forth in EXHIBIT 24, stating that the bill changes the concept of Montana Water Law.

Dave McClure spoke against the bill, quoting from the policy book of the Montana Farm Bureau (EXHIBIT 25).

Jo Brunner offered amendments addressing water storage (EXHIBIT 26).

Walt Saunders testified in opposition to HB 707, stating that the biggest long term impact was to the aquifer.

Rep. Westlake spoke in opposition to HB 707 (EXHIBIT 27).

Kay Norenberg testified against the bill as set forth in EXHIBIT 28.

Rep. Swift testified against the bill, stating that he was for off stream storage, and not this approach.

Rep. Koehnke, as an irrigator, went on record as opposing the bill.

Bob Saunders testified against the bill.

Proponents Submitting Testimony Who Did Not Testify:

Kenneth Osterman, Hi Line Sportsmen (EXHIBIT 29).

Questions From Committee Members:

REP. CLARK asked which 10 streams were involved, and Mr. Marcoux said that there were 10 stream reaches which could potentially involved, but that they were not identified at this time. He said that FWP would work with DNRC, who would then identify the reaches.

REP. MOORE asked if this bill would give the landowner the right to lease a portion of a stream, and who would get paid. Rep. Iverson answered that the person who owned the water rights would get paid, and that donations to FWP would be used for this purpose.

REP. O'KEEFE asked a series of questions of Mr. Ted Doney, Doney and Thorson Law Firm, about the problem mentioned on page 12, lines 11-16 of the bill, by Mr. Waterman, regarding the maximum amount of water that could be leased, that amount being the amount historically consumed. Mr. Doney said that he concurred with Mr. Waterman's concerns about that particular section, but said that could be amended. He said that the section could stay as it read in the bill, but that it was confusing.

REP. O'KEEFE asked about Colorado's Instream Lease Law, and stated that Montana was essentially a Colorado Appropriation Doctrine state. He asked about Mr. Waterman's assertion that this bill would undermine the basis of water law in the state, when in fact the state Montana was modeled after had such a law. He asked Mr. Doney if he agreed. Mr. Doney stated that he did have a problem with leasing water rights, since a leasing of rights implied that a person was not needing their water. However, he felt that with regulations under very controlled conditions, a lease could work and it did in other states.

REP. O'KEEFE asked if under Montana law, and the abandonment portion of that law, one still needed to prove intent to abandon, and has that intent ever been proven. Mr. Doney said that had been proven in recent case law, but that this bill would negate the problem.

REP. HARPER asked a series of questions of Mr. Waterman, one of which concerned the definition of appropriate and the addition of leasing by FWP, and asked if that concern could be addressed by having the leasing of a water right included under the section dealing with beneficial use. Mr. Waterman said that, offhand, that would work.

REP. HARPER asked about Mr. Waterman's concern on page 12 of the bill relating to the length of the lease and the termination date. He asked if the inclusion in the bill of language that would prevent any leasing of water past the effective date would address that concern. Mr. Waterman said that was possible, and suggested that one option would be to state that all leases regardless of their length would terminate at the termination date of this act; another option would address the renewal section.

REP. RANEY asked about Rep. Swysgood's question regarding the impact on ground water and the aquifer. Rep. Iverson said that the bill prevents any possible adverse effect any other water right holder, and that the renewal clause prevents any lease from being renewed that developed adverse impacts later in the lease period.

REP. ROTH asked if anything forces people to lease the water. Rep. Iverson said no, that it was voluntary, and just one more option or use for property.

Closing by Sponsor: REP. IVERSON closed, stating that he had no problem with Mr. Doney's or Mr. Waterman's language, although he did not think it necessary. He said that "adverse effect" appeared to be the biggest problem, and he assured the committee that the bill would not allow for adverse effects. He stated that the bill was for a pilot project, with a sunset on it. He agreed that off stream storage was the real answer, but that this solution costs much more, and the state does not have that money. He said that the issue was being worked on now, and this bill was not meant to be a replacement for water development. Rep. Iverson finalized his comments, referring the committee to the handouts, stating that the supplemental handout described the measurement process, a standard practice and one that was fairly accurate. He said that it was a good bill, progressive, and not a major change in water law.

DISPOSITION OF HB 707

Motion: REP. ADDY moved that HB 707 DO PASS.

Discussion: None

Amendments, Discussion, and Votes: REP. HARPER moved the amendments which addressed the concerns of the agricultural lobby. The motion CARRIED unanimously.

REP. HANNAH moved the Statement of Intent, and the motion CARRIED unanimously.

- REP. HANNAH moved to change the length of the lease to 5 years, Rep. Swysgood's amendment. REP. HARPER said that he didn't see any need for this amendment, as the water right owner would choose the length of the lease or contract. The motion FAILED.
- REP. HANNAH moved another amendment regarding the number of reaches, reducing the number to 5, and the motion FAILED.
- REP. CLARK moved to TABLE the bill, and the motion FAILED.
- REP. MOORE moved the amendment to include the concept of storage facility construction. REP. HARPER said that the point was covered, and REP. KADAS asked if the intent of the amendment was to state that donations would only be made for storage facilities, and Rep. Raney said no. REP. O'KEEFE stated that he would only support the amendment if there were two separate accounts, one for leases, and one for storage facility construction. Again, REP. HARPER said that the issue was covered, and the amendment was WITHDRAWN.
- Recommendation and Vote: REP. ADDY moved that HB 707 DO PASS AS AMENDED and the motion CARRIED, with Rep. Clark voting no.

HEARING ON HB 702

Presentation and Opening Statement by Sponsor:

- REP. JOHN COBB, House District 42, opened the hearing stating that this bill could stand on its own, and would not conflict with HB 707 if that bill were to pass. Rep. Cobb said that FWP or DNRC could get an option to lease water anytime within a ten year period. That lease could only be exercised if the Governor were to declare a disaster or emergency due to drought. He said that during the period of the lease, the water right would be considered to date July 1, 1973, thus avoiding any adverse effects. He said that he had gone through the Board of Natural Resources. He said that the leasing of water rights would extend for the length of time that the disaster or state of emergency due to drought existed. The monies paid from agency budgets or the governor's emergency fund would be payment for crop losses incurred during the time of the lease.

Testifying Proponents and Who They Represent:

Lorents Grosfield, self
Peggy Haaglund, Montana Association of Conservation
Districts

Proponent Testimony:

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

50th LEGISLATIVE SESSION -- 1989

Date 2/17/89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman			✓
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto			✓
Rep. Bob Gilbert			✓
Rep. Tom Hannah	✓		
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

STANDING COMMITTEE REPORT

February 18, 1989

Page 1 of 3

Mr. Speaker: We, the committee on Natural Resources report that House Bill 707 (first reading copy -- white), with statement of intent attached, do pass as amended.

Signed: _____
Bob Raney, Chairman

And, that such amendments read:

1. Title, line 7

Following: "RECREATION"

Insert: "DURING CRITICAL LOW FLOW PERIODS"

2. Page 1.

Following: line 14

Insert: "

STATEMENT OF INTENT

A statement of intent is provided for this bill in order to give additional guidance to the board of natural resources and conservation and the involved state agencies concerning the review and processing of lease applications for the purpose of maintaining or enhancing stream flows for fish, wildlife, or recreation.

The legislature intends that the board designate stream reaches eligible for water leasing in areas where leasing is necessary or likely to be necessary to enhance or maintain fish, wildlife, or recreation. Upon receipt of a list of stream reaches from the department of fish, wildlife, and parks, the board shall act expeditiously to designate eligible stream reaches. However, the legislature also encourages the board to select stream reaches where leasing has a good chance of success and where all interests may be satisfied.

The legislature also intends that the review process for lease applications be thorough and provide ample opportunity for consideration and input by concerned persons. As required in [section 4], the process should involve notice and opportunity for objections and hearing in the same manner provided for proposed changes in appropriation rights. The legislature contemplates that the

department of fish, wildlife, and parks will meet with appropriators along each designated stream reach to assess and consider any concerns before filing applications for lease authorizations. The legislature also encourages the department of fish, wildlife, and parks to assemble lease applications for filing at the same time to minimize costs to potential objectors. Moreover, the legislature anticipates that the department of natural resources and conservation will review the proposed leases for a single stream reach in one proceeding, though the potential for another set of lease applications at a future date is recognized.

The accurate identification of the stream reach in both the application and lease authorization is critical to a successful leasing program. Upon issuance of a lease authorization with an identified stream reach, the legislature intends that the entire leased appropriation may be protected to the extent provided under Title 85, chapter 2, in any part of the stream reach that is above the lessor's point of diversion. However, only the historical consumptive use of the right, or a smaller amount if specified in the lease authorization by the department of natural resources and conservation, may be protected in any part of the stream reach that is below the lessor's point of diversion. Finally, the legislature intends for the lessor to be responsible for taking action, if necessary, to protect the instream flow amount specified in the lease authorization, though the lessor and lessee may specify otherwise by contract.

From a broad policy perspective, the legislature desires to emphasize that the department of natural resources and conservation should consider and, if potentially feasible, recommend supplemental or alternative strategies that provide long-term solutions to problems that are not or probably will not be addressed adequately by water leasing in the board-designated stream reaches. These strategies may include storage enhancement or development and recharge from ground water sources."

3. Page 2, line 8.

Following: "uses;"

Strike: "and"

4. Page 2, line 12.

Following: "85-2-141"

Strike: "."

Insert: "; and"

5. Page 2.

Following: line 12

Insert: "(c) a use of water by the department of fish, wildlife,
and parks pursuant to a lease authorized under [section 4]."

6. Page 11, line 21.

Following: "recreation"

Insert: "during critical low flow periods"

7. Page 12, line 2.

Following: "recreation"

Insert: "during critical low flow periods"

8. Page 12, line 12.

Following: "However,"

Insert: "of the amount leased"

9. Page 14, line 4.

Following: "recreation"

Insert: "during critical low flow periods"

10. Page 14, line 19.

Following: "fund"

Insert: "exclusively"

11. Page 14, line 21.

Following: "recreation"

Insert: "unless expenditure for a different purpose is
authorized pursuant to 87-1-614"

HOUSE BILL 707

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Ex. #14
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2-17-89

conservation should consider and, if potentially feasible, recommend supplemental or alternative strategies that provide long-term solutions to problems that are not or probably will not be addressed adequately by water leasing in the board-designated stream reaches. These strategies may include storage enhancement or development and recharge from ground water sources.

How would an instream flow lease be applied on a "losing" or "shrinking" stream?

The existing law allows the department to condition its approval of a change in water use based on the existing circumstances and to avoid adverse affects to other water users. In the case of a losing stream, the department could reduce the amount that would be used for instream flow based on existing stream flow conditions. For example, if a stream naturally disappears at some point, the DNRC would not allow a change to instream flow beyond that point. If a stream naturally reduces by 20 percent, the DNRC could reduce the amount that could be used for instream flow by 20 percent.

Furthermore, a water commissioner on the stream is best qualified to allocate flows based on the specific factors that contribute to or diminish stream flow. The commissioner has discretion to allocate the flows based on the particular characteristics of the stream.

How is the consumptive part of an irrigation water right calculated?

Estimating consumptive use is not a new problem to water law. In western states where streams are highly appropriated, water right changes are more common than new water right applications. The central question in change application is often the amount of water consumptively used.

Many methods of estimating consumptive use are available. The consumptive part of an irrigation water right consists generally of the evapotranspiration (ET) and irrecoverable losses associated with the particular irrigation practices. ET is the sum of the water transpired by the crop and evaporated from the soil. DNRC generally uses the Blaney-Criddle method, which takes into account such factors as crop-type, mean monthly air temperature, monthly percent of average daylight hours, elevation, and growth stage of the crop. This estimates the potential water use of the crop, from which effective precipitation is subtracted to arrive at consumptive irrigation use.

Irrecoverable losses are associated with irrigation practices and hydrogeology. The losses include evaporation from conveyance systems or sprinklers and losses to deep percolation to groundwater.

Testimony to the House Natural Resources Committee
by
Terry L. Anderson

In Support of H.B. 707

My name is Terry L. Anderson, and I am a professor of economics at Montana State University who has specialized in the area of water marketing and water rights. I have published two books and numerous articles on this subject and continue to do research on the potential for marketing instream flows. The views presented here do not necessarily represent those of Montana State University.

My testimony is in support of H.B. 707. I support this bill because it is an innovative mechanism for generating cooperation among water owners, land owners, wildlife officials, and recreationalists. The drought of 1988 made us keenly aware of the tradeoffs between water diversions and instream uses. As a result the state water plan recently approved by the Board of Natural Resources and Conservation calls for greater attention to instream flow demands and for leasing as provided by H.B. 707.

As it now exists, the prior appropriation doctrine and the water permit system do not adequately account for instream values. They allow for water to be diverted and for the point of diversion to be changed, but they do not recognize rights to instream flows even if both water owners and recreational advocates want to leave water instream. In fact, these institutions foster diversion through the "use it or lose it principle." This does not encourage water use efficiency and means that important instream values are ignored.

H.B. 707 is an innovative attempt at rectifying these problems. By allowing DEWP to lease water in voluntary transactions, it provides a mechanism for reallocating water to higher valued instream uses where both the DEWP and the lessor agree. This gives existing diverters control of what water is leased and an incentive to seek ways to conserve on water use. By encouraging efficiency the bill allows Montana to maximize the value of this important resource. Moreover, by letting recreational and environmental interests express their values through DEWP leasing, the bill gives a water use with increasing value a place in the allocation scheme.

It would be better to allow individuals and groups to lease water privately, thereby avoiding unnecessary bureaucratic red tape and ensuring timely action when instream flows may be critical. However, this bill is a good second-best solution because it at least allows leasing for instream purposes and allows individuals and groups to contribute funds to the state leasing process.

While some see this legislation as a radical departure from existing law, it is important to recognize that it is very little different from the process whereby points of diversion are changed. Suppose that an upstream diverter sells water to a downstream diverter. Only the portion of the water right which is consumed can be sold and only then if there are no objections or if their objections are not sustained. Between the former

2-11-87

upstream diversion point and the new downstream point, the water necessarily becomes an instream flow. Such a transaction is perfectly legal under current law and has all the necessary checks to prevent harm to third parties.

H.B. 707 is almost identical to the above type of transaction. Under this bill an upstream diverter can lease his consumptive right to DFWP. The transaction can only take place if there are no objectors or if their objections are not sustained. Between the upstream diversion point and the downstream end of the reach which must be specified by DFWP and approved by the Board of Natural Resources and Conservation, the water necessarily becomes an instream flow. The only real difference is that at the end of the reach, the water is freely available to any other users who can establish a claim to it. Since these two transactions are so similar, some believe that courts would approve of a DFWP or even a private lease for instream purposes. The advantage of this legislation is that it takes the decision out of the conflict ridden courts.

The bottom line is that instream leases provide a "win-win" institutional arrangement. Upstream diverters are compensated for any crops they forego; instream flow demands are met; and downstream water users get water paid for by DFWP. Unlike judicial settlements, H.B. 707 which requires voluntary transfers encourages cooperation between DFWP and water owners. At a time when most agree that landowner-sportsmen relations are at an all time low, this is very important.

The dewatering of the Ruby River in 1987 provides an excellent illustration of how the leasing could work. When low water in 1987 caused reaches of the Ruby River to dry up, there was no effective leasing mechanism to get diverted water back into the river even if both water owners and fishing advocates agreed. The water clearly belonged to farmers and ranchers who were diverting it, and trout fishermen had no way to purchase or lease this water. While water was returned to the river through negotiations between agricultural interests and DNRC, it was too little too late. If trout fishermen had been able to "put their money where their trout were," the dewatering problem might have been avoided. H.B. 707 would have provided this opportunity.

Some people contend that this bill should require that the legal fees of successful objectors should be paid by the party initiating the lease, DFWP. There is good reason for this since it puts the burden on DFWP to find water that will not raise objections. However, if this provision is good for this legislation, it is equally applicable to all water transactions where objectors are successful in sustaining their objections and therefore should apply to all water transactions.

A final reason to pass this legislation is that it marks a significant redirection from the litigious mood of the stream access cases and legislation. Few doubt that the stream access issue contributed greatly to deteriorating landowner-sportsmen relations. I agree with private landowners that stream access amounted to a taking of property without due process. Unfortunately the courts have found otherwise.

H.B. 707 is an improvement because the state is purchasing rather than taking water rights from water owners. Again I stress that it would be better to allow recreational and environmental interests to lease the water

2-17-89

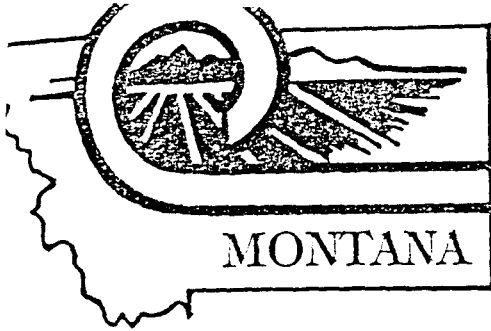
directly, but at least state leasing is better than taking.

In closing let me point out the consequences of rejecting this legislation. Recreational and environmental interests have legitimate demands for instream flows; these are beneficial uses. If these demands cannot be expressed through voluntary water transfers, recreational and environmental interests will have no choice but to seek legislative or judicial redistribution of water. Since the public trust doctrine worked to get access to public water even when it flows across private property, many lawyers believe that the same doctrine can and should be used to maintain and increase instream flows. Let me quote from a leading legal scholar discussing "emerging forces in western water law."

"Some western state legislatures may be tempted to ignore instream flow needs and thereby avoid the constraints they place on other water uses. Such an approach, however, may prove implausible due to the recent reach of the Public Trust Doctrine [T]he Doctrine bars water diversions 'once it becomes clear that such diversions harm the interests protected by the public trust' Many parties . . . are considering how the Public Trust Doctrine could be innovatively asserted to further their positions. As a result, the Doctrine promises to be a factor in the future course of western water law. . . . The Public Trust Doctrine represents the potential for impacting western water users and diminishing the control of state government over the allocation of water."

The public trust doctrine may provide a way for instream flow interests to get their water, but it will not come without significant conflict.

If you want to lose control of Montana's water to the courts and to generate conflict that will make stream access seem like a Sunday picnic, vote against H.B. 707. But if you want a positive alternative that does not hurt agriculture (indeed it gives water owners another "cash crop") and allows instream demanders a way to express their interests through voluntary cooperation in water markets (as opposed to the conflict of courts), vote in favor of H.B. 707.



HB

MONTANA

Association of Conservation Districts

1 South Montana
Helena, MT 59601
February 17, 1989

443-5711

Testimony to the House of Representatives Natural Resources Committee
on HB 707.

For the record my name is Peggy Haaglund, executive vice president of
the Montana Association of Conservation Districts.

The MACD does support HB 707. In November of 1988 at our annual
convention the delegation adopted the following resolution. I would
like to read it to you.

Whereas in some cases streams are dewatered in low flow years to the
detriment of instream values; and

WHEREAS MACD prefers storage built by investment of both instream and
offstream users as a long term answer to Montana's water supply; but

WHEREAS in the meantime contractual leasing arrangements may be
possible that serve the interests of both instream and offstream users;

THEREFORE BE IT RESOLVED THAT MACD supports voluntary leasing to the
Montana Department of Fish, Wildlife and Parks of offstream water
rights for instream flows as long as current water rights are not
adversely affected and the volume of the water leased is not greater
than the original depletion.

Thank you.

HB 707
February 17, 1989

EXHIBIT 21
DATE 2/17/89
HB 707
(Signature)

Testimony presented by Ron Marcoux, Department of Fish, Wildlife and Parks

The past several drought years have clearly demonstrated how water shortages can affect all of us and how difficult it is to resolve the problem. As a result the legislature has many bills this session addressing various water issues. This bill may be one of the most important for instream uses over the long term.

The hallmark of Montana's modern water laws, as they have evolved since 1973, is to provide adequate flexibility to address diverse needs while protecting existing users. HB 707 can provide a much needed mechanism to keep streamflows from reaching critically low levels in important streams. HB 707 provides that, as long as no other existing water users are affected, the department can lease water from a willing right holder. The consumptive part of that water right can be left instream for a specified reach.

Our experience in the Bitterroot Valley indicates this can be done. Although the instream water in the Bitterroot comes from storage, we have demonstrated our ability to work with local irrigators, conservationists and the district court to deliver the water downstream. In fact, the increased flow has also benefited irrigators along this reach of stream.

Under this bill, the department's authority to lease water is limited to 10 stream reaches as designated by the Board of Natural Resources and Conservation. In a trial period, this is a reasonable approach.

The bill contains a number of safeguards to protect existing water users and provides a limited scope of leasing while the program is being developed and evaluated. The department feels the ability to lease water for instream purposes is an important mechanism to alleviate some of the problems on our dewatered streams, and offers its support to HB 707.

HB 707
Chris Hunter

AFS Testimony - HB 707
February 17, 1989

Chris Hunter, Montana Chapter, American Fisheries Society

I am representing the Montana Chapter of the American Fisheries Society. The American Fisheries Society is a professional organization for fishery biologists and scientists that includes nearly 8,000 members from throughout North America. The Montana Chapter consists of nearly 150 fishery professionals employed by the private sector, university system and state and federal government.

Members of the Montana Chapter of the American Fisheries Society would like to voice our approval for the spirit and intent of this proposed legislation because it provides some hope that streamflows will be enhanced during droughts such as we experienced the last two summers. However, we would also like to bring to your attention what we feel are several major limitations in this bill which we ask that you take into consideration.

The three fundamental elements of trout stream habitat are: (1) adequate streamflow, (2) good water quality, and (3) secure physical habitat elements that include the bed and banks of the stream and surrounding riparian areas. The loss or deterioration of any of these will result in loss or deterioration of a fishery.

This bill offers the opportunity for the Department of Fish, Wildlife and Parks to enhance streamflows through leasing of water

Ex. #22

2/17/89

rights presently allocated for offstream uses. However, we see no reason to limit the scope of free market transactions between willing parties.

We recommend that you consider expanding the bill (1) to allow both leasing and purchasing of offstream rights for instream purposes, (2) to permit parties other than the Department of Fish, Wildlife and Parks to purchase or lease waters for instream uses, and (3) to remove limitations on the numbers of streams or reaches of streams that are eligible for such transactions.

As a property owner (and a water right is a form of ownership) I would not like being told that someone else can lease their property but that I cannot because I live along the wrong river or that I am restricted as to who I can sell my property to or whether I can sell it or lease it.

We urge your support of this legislation but we ask that you consider the amendments that we described. Thank you!

WITNESS STATEMENT

NAME Janet Ellis BILL NO. HB 707

ADDRESS Helena

WHOM DO YOU REPRESENT? Audubon

SUPPORT ☒ OPPOSE ☐ AMEND ☐

COMMENTS: Water is a precious resource to all
of us in Montana — including ^{our} fish and
wildlife. This bill provides ~~the state~~ ^{the state} with an
important too to protect our fish and wildlife
resources.

Thank you.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

EXHIBIT 24
DATE 2-17
HB 707
(Signature)

TESTIMONY RE HOUSE BILL 707

I am Ronald F. Waterman, attorney at law, practicing in Helena, Montana. I appear on behalf of the Montana Stockgrowers Association, Montana Cattlemens Association, and Montana Association of State Grazing Districts in opposition to House Bill 707.

There are a number of reasons why these Associations oppose this bill. One deals with fundamental philosophies and the other reasons flow to the specific areas of the bill.

In opposing this legislation, these agricultural organizations do not ignore the problems the past drought has had upon Montana's streams. Livestock producers have been affected by drought. They know and understand the consequences the drought-like conditions caused, not only to their own operations, but also to the state's streams, its fisheries and wildlife. Nonetheless, a recognition of the drought does not justify approval of House Bill 707. The proposed bill contains numerous problems.

The first fundamental problem these agricultural organizations have with House Bill 707 is the underlying concept of allowing an individual who is not using a water right to lease the same to another party. Water rights are unique property rights. They rely exclusively on use to warrant their continued existence. A water user may assert a claim through court filings for a certain quantity of water or

period of water use. However, if the actual use is less, the actual use controls and determines the amount of the water right. A water right is exclusively a use right. Without actual use a water right does not exist. Likewise, when a water right is not used, the water becomes available to satisfy junior appropriators rights in the source of supply. This prevents waste and assures that water in a source of supply is continually put to a beneficial use.

Leasing contains the assumption that an individual owns a right which can be leased to another. A water user who does not put water to a beneficial use does not have a water right capable of being leased to a third party. When a water user declines to put water to a beneficial use, that water is then subject immediately to junior water appropriators' rights. A water user who does not place water to a beneficial use simply has no water right available to lease to a third party.

House Bill 707 contradicts this fundamental concept of water law. The bill suggests that a water user who does not place water to a beneficial use can nonetheless lease the water to a third party. A water user who does not put water to a beneficial use simply has no water to lease. For this reason alone, the concept behind House Bill 707 is contrary to applicable water law and for this reason the agricultural organizations resist the bill.

Further, these organizations oppose this bill because the

Ex. #24

2-17-87

bill identifies as a purpose, the enhancement or maintenance of stream flows for fish, wildlife or recreation. Clearly, there is no need for this proposed legislation, except during those times when a severe drought occurs. Such was the finding of the water policy committee and was the principal reason Governor Stephens has used to explain his position he would support water leasing legislation. If, in fact, water leasing is appropriate during periods of drought, then the bill and all references throughout should not be to enhance or maintain stream flows for fish, wildlife or recreation but rather, should be to enhance or maintain stream flows "during critical, low flow periods caused by drought." Essentially, this bill proposes to have state government exercise emergency powers during a drought period. Under those circumstances, the bill should be specific that it does not authorize the general leasing of water rights but only allows those leasings during the specified emergency periods. All references to enhancing stream flows for fish, wildlife or recreational purposes should be deleted from the bill.

The agricultural organizations likewise object to the amendment contained in Section 1, amending Section 85-2-102(1)(c), MCA. A lease as described in the bill is the lease of an existing right. It should not be defined as a new appropriation by the Department, as suggested through this section. The suggestion that the lease becomes a separate

appropriation, rather than a continuation of the original appropriation, suggests that the Department of Fish, Wildlife and Parks acquires, through the lease, a separate property interest to the water. This amendment is inappropriate and should be deleted from any final bill.

We likewise question Section 4 and several of its sub-parts. Section 4, subparagraph 4 advances inconsistent and contradictory provisions. On one hand, it suggests the maximum amount of water leased is the amount historically diverted. On the other hand, the language suggests the maximum amount of water leased is the matter historically consumed. In truth, if leasing is a valid concept, the amount of water historically consumed by the lessor, is the only amount which could be leased to the department. If a lessor diverts more water than is actually consumed, the difference is a return flow. That return flow will always be available to junior appropriators to satisfy their individual water rights. Consequently, continuation of references to the historic diverted quantity of water only assures litigation over this issue.

Likewise, subparagraph 5 of Section 4 is in conflict with Section 9. According to Section 9, the act terminates on October 1, 1999. A lease entered into for ten years cannot be renewed thereafter because the underlying authorization for the leasing concept, this legislation will have expired by

2-17-89

then. All leases entered into regardless of when entered into, will by reason of Section 9 terminate on October 1, 1999. As a consequence it is unrealistic to insert in language of renewal, especially allowing renewals beyond 10 years from passage of the legislation. Further, the renewal language as written suggests a lease may continue in perpetuity subject to being renewed every ten years. Even if a water right lease is authorized, it should not continue forever without a periodic renewed application for the lease.

There is one final point with regard to the bill which these organizations object. Section 6(1) allows the department to accept contributions from public or private entities for the purpose of leasing and places those contributions in deposit in the fish and wildlife mitigation trust fund. Those contributions however, are not earmarked and as a consequence could be expended for any purpose. If private contributions for water leasing is approved, the money collected should be used exclusively for the acquisition of leases.

Further, there are several significant omissions from the bill which need be addressed in any leasing legislation. In the event leasing is permitted, one purpose of the leasing should be to fill offstream storage to avoid the reoccurrence of drought conditions. There is no mention of this important element of drought abatement. Without including language concerning offstream storage and the utilization of waters im-

pounded in such storage, any leasing bill will continue to have these agricultural organizations' strong objection to its passage.

Further, this bill does not state what role the Department of Fish, Wildlife and Parks plays in the event it becomes a lessee to waters on a stream reach. The Department of Fish, Wildlife and Parks should be required to waive the right to object to any other water use applications on the stream reach during the period of the lease. The Department of Fish, Wildlife and Parks, with its resources, should it become a lessee of water, could potentially fund broad objections which would prevent further development on a stream unless the department's ability to file objections is waived.

The concept of water leasing clearly is a new and unique way of addressing drought related stream flow problems. As set forth above, House Bill 707 advances this concept in an inappropriate manner. We recognize however, that there may be need to experiment with this concept on a few limited stream reaches. Accordingly, my clients would consider and evaluate legislation which was site specific and limited to only one or two stream reaches, with identified quantities of water to be leased and with disclosure of the parties who would be affected by the lease. This information is likely to already be in the possession of the Department of Fish, Wildlife and Parks. Any leasing bill would require specific sunseting to

Ex. #24

2-17-89

assure that the experiment retained its character of an experiment and the bill did not provide an opportunity to expand the concept of leasing beyond its experimental stage until the full ramifications of a water leasing program could be evaluated.

A water leasing bill has been advanced by its advocates as an alternative to potential litigation over instream flows. While the agricultural organizations are not anxious to involve themselves in future litigation and the issue of whether instream flows are protected by the public trust doctrine, nevertheless, these agricultural organizations cannot in the face of such threatened litigation, give approval to House Bill 707 or the concept it advances. House Bill 707 will not resolve the controversy. House Bill 707 instead will only impose upon some water users an unwarranted experiment which should not be pursued by the State of Montana at this time.

For all of these reasons, the Montana Stockgrowers Association, Montana Cattlemens' Association and the Montana Association of State Grazing Districts oppose House Bill 707 and ask this committee to vote "do not pass" regarding this legislation.

7681R

HB707

Rep. Iverson

Feb. 17, 1989

Support

Oppose

X

Amend

X

Montana Water Resources Association

Jo Brunner, Executive Secretary

Mr. Chairman, members of the committee, it has been difficult for our organization to make the decision as to which side of this to come in on.

Our immediate past president is on the Advisory Council for the state water plan, and I sat on the Technical Advisory Committee for the instream flow portion. I also participated in the informal committee discussion on leasing of instream flow, as did several of MWRA members. Not because our Association actively supports the leasing of waters, but because we felt that should leasing ever come about, we ought to have participated in the process--much like a 'the cats away and the mice might play' situation.

The Montana Water Development Association has protested and continues to protest the short length of time that we have been given for the instream flow, and for the Ag Efficiency portions of the Water Plan to be discussed. The instream flow specifically is such a serious change in our historical water uses and laws that more time must be given for consideration by those effected, which ought to include information and education processes.

The Montana Water Development Association is in agreement with many of the opinions expressed here today, but we wish to offer amendments to this bill, addressing the specific inclusion of storage facilities as protection of instream flow for fisheries and wildlife.

MWRA is a very strong supporter of storage facilities, and it has to be recognized that despite original costs, many of them still being paid off, the greatest protection that fisheries have are storage facilities that store water for regulated release, protective to the fisheries in a great many ways. And it is our opinion that the costs of constructing such facilities should be shared, just as the benefits are shared. Consequently we offer these amendments.

Page 14, Section 6 (1) Line 11, after the words appropriation rights, insert a comma, and the words,----for the construction of and participation in the construction of storage facilities,-----

Page 14, Section 6, (3) line 19, after the words existing rights, insert a comma and the words, ----for the construction of and participation in the construction of storage facilities,-----

Mr. Chairman, members of the committee, it is our request that you do adopt these amendments. We cannot support this bill in its present form.



The Big Sky Country

27
DATE 2-17-89
RE 707

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE VERNON L. WESTLAKE

HOUSE DISTRICT 76

HOUSE ADDRESS:
CAPITOL STATION
BOX 122
HELENA, MONTANA 59620

COMMITTEES:
AGRICULTURE LIVESTOCK &
IRRIGATION
HIGHWAYS & TRANSPORTATION
STATE ADMINISTRATION

February 17, 1989

House Natural Resources Committee:

Rep. Bob Raney, Chairman
Rep. Ben Cohen, Vice Chairman

Mr. Chairman, Members of the Committee, I am Vernon Westlake, Representative of House District #76 in Gallatin County.

I oppose HB707 for many of the same reasons that I am sure will be brought out by the AG groups this afternoon.

This bill is not just an act or pilot project for voluntary transfer of an existing water for instream flow, but will rewrite the entire water law in the State of Montana.

The bill will eliminate the prior appropriation doctrine in effect, because "diversion" for beneficial use will no longer be required. I believe this will bring about the biggest problem or conflict between water users that we have ever seen.

For example, let's say, there are 10 appropriators on a stream being considered for leasing. The oldest water rights

point of diversion is located at the head of the source. Naturally, the Department would approach this party and make an agreement to lease for instream flow. Immediately the 9 appropriators are adversely affected. I believe most of you understand that junior appropriators have the right to use the water of the senior appropriator when he isn't using all or part of his right. The lease for instream flow would preclude the junior appropriators from using the senior appropriators water and thus are adversely affected so litigation would start.

Voluntary leasing of water rights for instream flow is not the answer for enhancing streamflows for fish, wildlife or recreation. Storage is the answer and that came out loud and clear this past summer and fall when DNRC conducted hearings throughout the state for water planning and development.

I shall conclude by saying this bill addresses so many concerns and the fact that today is the last day it could be heard, I urge the committee a "do not pass" and recommend leasing of existing water rights for instream flow be again considered by the Water Policy Interim Committee.

Thank you, Mr. Chairman.

707



WIFE Women Involved In Farm Economics

HB707
Kay Norenberg
WIFE (Women Involved In Farm Economics)
OPPOSE

Mr. Chairman, members of the committee. My name is Kay Norenberg, representing WIFE (Women Involved In Farm Economics).

We would like to go on record as opposing HB707.

We agree that there is a need and a vital use for instream flow for many reasons.

We believe that before we commit ourselves to leasing there should be more study to see how this would affect ground water and what it would do to other water users on the stream.

Irrigation practices are now what maintains the instream flow in the winter. Let's not just jump on the band wagon because of last years severe drought. Let's look things over and make a wise decision with facts in front of us.

We should look at some alternatives to maintain flow in dry years such as storage facilities. Let us work together for the good of everyone in the state of Montana. We believe that means the use of storage facilities for instream flow.

Thank you!

HB 76 /

STATEMENT OF HI LINE SPORTSMEN
IN SUPPORT OF HB-407

TO: House Natural Resources Committee ¹

Hi line Sportsmen is a citizens' group from north central Montana interested in promoting hunting, fishing, and outdoor recreation in general in our area. We sportsmen have over 150 members who live in Chester, Havre and between Shelby, Conrad and Great Falls. A main area of concern is the Marias River above and below Tiber Dam - Lake Elwell. We sportsmen strongly support HB 407, Streamflow Leasing Act since we believe it would help maintain adequate minimum stream flows in our area and in the rest of Montana.

Some relevant facts:

For the last two summers, the lower Teton River has been a totally dry. This has been disaster for wildlife and outdoor recreation.

Last summer. The Marias River above Lake Edwell was almost dry. In every day of August, 1988, more water evaporated from Lake Elwell than flowed in at the from the Marias River at the uppers end.

Hi Line towns from Havre to Chester depend on the Marias for drinking water. In addition, there are many ranch-town water systems that depend on the Marias. Irrigators and ranchers below Tiber Dam need adequate flows.

The sportsmen have in the recent past been active in working with the Bureau of Recreation, irrigators, farmers, water use companies on a cooperative committee to regulate water flows from Tiber Dam. Since this cooperative effort, stream flows have been stabilized and maintained. Fishing has improved. Water quality is also improved. Irrigators can count on adequate flows.

We sportsmen are now very concerned about the minimum flows on the upper Marias River. A means of providing an adequate minimum flow of 200 CPPS is needed if this valuable river resource is to be properly protected.

Please approve HB 407, Streamflow Leasing Act to be considered by your committee. Help us protect the main recreation resource of north central community.

HI LINE SPORTSMEN
Kenneth Osterman, President
Charlie Frey, Legislative Relations

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VISITORS' REGISTER

Natural Resources COMMITTEEBILL NO. HB 707DATE 2-17-87SPONSOR IVERSON

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Robert A Ellis	Helena V Glet MWRP	☒	☒
Ed Brunner	MWRP		☒
Frank H. H. H.	Townsend		☒
John Selwood	WETA	☒	
Dave McClure	Mont Farm Bureau		☒
Vernon L. Westlake	SELF & APA		☒
JOANIE MILLER	LIVINGSTON #676	☒	
Ann Linn	LIVINGSTON #676	☒	
Roger Linn	LIVINGSTON #676	☒	
Mr. Linn	W.S.S.		☒
Bill WEITCH	LIVINGSTON #676	☒	
Walter L. Malone	Helena, MWRP #117		☒
Marvin Barber	A.P.A.		☒
GEORGE OCHENSKI	ALLIANCE FOR MT. WATER	☒	
Stan Brookshaw	Treat V. United	☒	
Jim Jensen	MEIC	☒	
Marvin Barber	A.P.A. (202)		☒
Steve Adams	Townsend MTHB678		
Garet H Ellis	Helena	☒	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Natural Resources COMMITTEE

BILL NO.

HB 707

DATE

2-17-59

SPONSOR

IVERSON

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Jerry Jack	Mt Stockhausen		✓
CHRIS HUNTER	HELENA	X	
Ray Smith	Canyon Creek	X	
Paul S. Rood	Helena - FFOAM	X	
Peggy Haglund	MT Assoc. of Cons. Dist	X	
Paul F. Whitman	MSCA		✓
James Barclay	DNRC	✓	
Chuck Simpson	St Rep Dist 73		✓
Ray Norberg	WIFE		✓
Glen Marx	Gov's office	✓	
Ron Marcus	FWP	✓	
Garrett Saunders	W. SS		✓
Leventis Bliss Field	Big Tender (BNRC)	X	
Garret Mather	Mt. Gattie Thomas		✓
Ray Holquist	Helena	✓	
Smith Eubank	MT Wildlife Federation	✓	
Dana Field	ulsla	X	
Kim Wilson	Sierra Club	✓	
Ernie Spurr	Hamilton		✓
Roll Alford	Office of the Governor		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Attorney General COMMITTEE

3063

BILL NO. 707DATE 2-17-89SPONSOR Iverson

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
John McGuire HB707	W. S. L. MT		✓

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

List of Testifying Proponents and What Group They Represent:

John Skufca representing the Department of Livestock
Jerry Jack representing the Montana Association of State
Grazing Districts and the Montana Stockgrowers
Lorna Frank representing Montana Farm Bureau

List of Testifying Opponents and What Group They Represent:

None

Testimony:
Proponents:

John Skufca-See exhibit 1.

Jerry Jack-"We certainly rise in support of this bill. Back in October of 1988, the Montana Stockgrowers, and the Transportation Brand and Theft met with Mr. Graham and members of the Department of Livestock and strongly supported the concept at that time. We strongly support the bill."

Lorna Frank-"We are in support of this bill."

Questions From Committee Members: Senator Aklestad-"I haven't gone through the bill in its entirety, but how would this affect registered bull sale operations where ranchers--let's say two ranchers go together and have registered bull sales, and that type of sales?"

Representative Iverson-"If they resale within 60 days, they may come under this law."

Closing by Sponsor: Representative Iverson closed.

HEARING ON HOUSE BILL 707

Presentation and Opening Statement by Sponsor:

Representative Iverson stated, "This issue was something that was discussed at the state water plan meeting. It was also discussed at the Water Policy Committee hearing earlier. While either of those groups proposed legislation along these lines, the Governor decided to issue that it certainly had to be addressed and it should be addressed during this legislative session. There were several bills in the process that dealt with this. There weren't any of them that have the safeguards that I considered adequate for this kind of a program. So what happened

was a group of people including Senator Galt, myself, and Senator Yellowtail, got together and wrote what we thought would be the safest way to go about this. That's what we offer today. I want to tell you off the top what it doesn't do. It doesn't adversely affect the other user's rights. It doesn't confiscate anybody's water. It doesn't force anybody to do anything that they don't want to do. I want to emphasize this, it's not a radical change in Montana water policy."

"Water rights as we know them in Montana are a constitutionally guaranteed right of property. As such, under current law they can be sold, traded, leased, severed from the land, you can do all kinds of things with them. As long as you don't hurt anyone else by doing it. You can deal with that just about in the same manner you can deal with any problem. You can sell your water to industry; you can sell your water to Montana Power to cool generators. You can sell it for coal slurry. You can sell it for drinking. You can sell it to Albuquerque; you can pipe it down there so people can wash their cars with it, but you can't lease it in the creek. What this bill does and what it is designed to do is expand your right, your constitutional right in that property, to that one and remaining option. It allows you to leave it in the creek without losing it and you get paid for doing it."

"The bill is really pretty simple. First of all, The Board of Natural Resources can designate up to ten. They don't have to designate ten but they can not designate more than ten. They can designate up to ten streams or streams reaches. That is portions of streams. That might be a 100-yard portion of streams. They can designate up to ten of these stream reaches as being eligible for leasing. They can only do that if they can establish that there is a necessity to do it. You find when you read this bill closely, we pretty well gathered that it's got to be done carefully and in a considerate manner." See exhibit 2.

List of Testifying Proponents and What Group They Represent:

Carol Mosher did not testify but handed in testimony
Glenn Marks representing the Policy Aide Natural Resources
for the Governor's Office
Ron Marcoux representing The Department of Fish, Wildlife,
and Parks
Lorents Grosfield representing himself and the DNRC Board
members

Karen Barkely representing the DNRC
Ted Doney representing himself (attorney in Helena)
Jo Brunner representing Montana Water Resources Association
Jack Salmond representing Western Environmental Trade
Association
George Ochenski representing AMU
Chris Hunter representing 150 professional fisheries that
make up the membership of the Montana Chapter of the
American Fishery Society
Bill Kane representing Montana Trout Unlimited
Peggy Haaglund representing the Montana Association of
Conservation District 10
Jim Ingamar representing himself
Richard Ormsbee representing Bitterroot Conservation District
Marshall Bloom representing Bitterroot Chapter of Trout
Unlimited
Janet Ellis representing the Montana Audubon
Tony Schoonen representing The Skylines Sportsman Club of
Butte and the Anaconda Sportsman Club
Kim Wilson representing the Montana Chapter of the Sierra
Club
Bob Whalen representing Trout Unlimited
Charley W. Frey representing Hi-Line Sportsman's Club

List of Testifying Opponents and What Group They Represent:

Albert Hengle representing himself, a hydrologist from
Victor Montana
Carl M. Davis representing water users of Lima, Montana, an
attorney from Dillon
Representative Vernon Westlake, House District 76, Gallatin
County
Carl M. Davis handed in list of signed opponents
Ron Waterman representing the Montana Stockgrowers, the
Montana Cattleman, and the Montana Association of State
Grazing Districts
Richard Grosman representing himself
Dave McClure representing Montana Farm Bureau
Louise Monroe representing herself, from the Bitterroot
Valley
Shirley Bugli representing WIFE
Ole Ueland representing Headwaters Agriculture Water
Resources Committee
Walter A. Steingruber representing Agriculture Preservation
Association
Curt Diegl representing himself, from Broadwater County
Eugene Melvey representing Headwaters Committee
Randall Smith representing himself, from Glen, Montana
Maynard Smith representing himself, from the Big Hole River
Bill Garrison representing himself, from Glen, Montana
Wilbur Anderson representing Vigilante Electric Cooperative
in Dillon, Montana

Nick Schutter representing himself, from Manhattan, Montana
Bill Murphy representing himself, from Garrison, Montana
Mark Cambridge representing himself
Mark Etchart representing the Glasgow Irrigation District
and the Malta Irrigation District
Pat Barnes representing himself
Bill Spring representing himself, from Stevensville, Montana
Allen O'Hare representing himself, from Livingston
Jack Perkins representing the Deer Lodge Valley Conservation
District
George Vogt representing himself, from the Ravalli County
Robert VanDerVere representing himself
Frances Stordtman representing herself, from the Big Hole
Valley
Jay Chamberlin representing the Bitterroot Irrigation
District
Senator Elmer Severson representing himself
John Bailey representing Dan Bailey's Fly Shop
L.M. Powell representing The Bitterroot Conservation
District
Richard A. Ormsbee representing Bitterroot Conservation
District, from Hamilton, Montana
Allen Martinell representing the Water Users Irrigation
Company
Donald R. Marble representing himself, from Chester, Montana
Eugene Mangley representing Granite County Commissioners
Headwaters Agriculture Water Committee

Testimony:
Proponents:

Carol Mosher handed in testimony. Ms. Mosher did not
testify at the hearing-See exhibit 1A.

Glenn Marks-See exhibit 3.

Ron Marcoux-See exhibit 4.

Lorents Grosfield-"I would like to read a letter that was
written by the Chairman of the Board of Natural
Resources." See exhibit 5.

Karen Barkley-See exhibit 6.

Ted Doney-"Our firm specializes in water law. 80 to 85% of
our practices are done on water law. I think this bill
is a bill of critical importance to our state. I
didn't testify on this bill in the House. I wanted to
hear the testimony and listen to what people are saying
and think about some of the points being raised. While
I was in that hearing I kept thinking to myself, I've
been here before. For some reason I felt like I had

seen the same scene. I couldn't remember what that was."

"Finally, it dawned on me--stream access. If you remember, stream access was a big issue in 1981 and 1983 in the legislature. The legislature did not address stream access during those sessions. Because of the failure of the legislature to address that issue, it wound up in court. We wound up with two cases that none of us could live with."

"We need to address this issue today or we're going to wind up in court or worse yet, it's a constitutional amendment which I'll talk about. It will change the law forever in this state. I think it will make a large impact on our water rights system. In other words, if we don't have the leasing bill this session, I feel we will be facing worse alternatives."

"What are some of those alternatives? One, we keep muddling along like we are now, hoping things work themselves out, but they won't. We know they won't."

"Two, we get a court case which other proponents already alluded to that says you can already lease water rights for instream flow. I tend to feel the courts in Montana are not going to uphold that kind of case. I don't think there is such a thing as leasing water rights for instream flow under current law. Somebody may get a court decision out of it."

"The third alternative, we will have a court case that says that all water rights in the State of Montana are subject to the public trust, and water must be left in the streams for recreational use by the people. I think that is a very real possibility. It's happened in other states."

"The fourth alternative, we have an initiative on the ballot. I think this is the most likely alternative. If you read last night's IR (Independent Record), I think you can understand the proponents of this kind of legislation are thinking of that alternative. If I were a proponent of instream flow, I would propose a constitutional amendment, not a statute. This would amend Article 9, section 3 of our Constitution, the water article. That currently says, the current law in the constitution says water is its own right of the state and subject to 'beneficial uses by the people'. I would add a clause to that section that says beneficial uses are subject to the right of the people to obtain access to such waters for

recreation. That's all it would take people. A simple constitutional amendment that we have water rights in the State of Montana subject to the public trust doctrine."

"I'm not going to stand up here and tell you today that by passing this bill you will prohibit the court from saying the public trust super-imposes on water rights or you will be guaranteed that it will not be a constitutional amendment, but it will go along with--it will keep things out of court in my opinion. It will encourage people to try and work with the system. I think it is critical we have the bill."

Jo Brunner-"Our association has come to a difficult decision." See exhibit 7.

Jack Salmond-See exhibit 45.

George Ochenski-He stated there were people who have come from all over the state and he indicated he would appreciate if the proponents would keep their testimony short and to the point.

Chris Hunter-"We strongly support this legislation. We would have liked to see it be more far-reaching. We think the bill as it is, is a good compromise."

Bill Kane-"Trout Unlimited strongly supports HB 707 in its present form."

Peggy Haaglund-See exhibit 10.

Jim Ingomar indicated he supported HB 707.

Richard Ormsbee-"In the Bitterroot we have succeeded in welding a combination of sportsman, landowners, recreationists, fish, game, and parks, The Department of Natural Resources and Conservation, and most of the landowners in the Bitterroot. We believe that the conservation district can secure water in an adequate and effective way." See exhibit 50 for further testimony.

Marshall Bloom-"We are supporting this bill and I would like to thank Representative Iverson, Governor Stephens, and the other individuals who have worked so hard to get it to this point."

Janet Ellis-"We are in support of HB 707."

Tony Schoonen-"We rise in support of this bill."

Kim Wilson-"We also support this bill and we urge you to do the same."

Bob Whalen-"I'm representing 250 Trout Unlimited members. We wish to voice our strong support of HB 707 without amendments. We ask these people, to just give it a chance." See exhibit 11.

Charley W. Frey handed in testimony. See exhibit 40

Testimony:

Opponents:

Albert Engel-"I am a hydrologist and geologist with a Ph.D and a DSC. I've taught in three major American Universities. I've consulted for the U.S. Government. Since the Bitterroot has been used as an example here, I have brought segments of a chapter of a book I'm writing." See exhibit 12.

"This bill is well-intentioned but it will not work. It will not work because of the ignorance of the people who are proposing it. There are three major users of water and let's take the Bitterroot Valley as an example. There are the diversionary uses--largely farmers and ranchers and that sort of thing. Then there are the well owners."

"In 1960 there were less than 1,000 wells in the Bitterroot, today there are almost 7,000. In 1960, each well used less than half acre-foot. Today, the wells averaged about 3 acre-feet per year. If my neighbor and I leased our water to whomever, Fish and Game, whatever, if we leased it, we would dry up 78 wells in one aquifer. We would create losses on the order of 20 millions dollars. Why? Because it is the leaky inefficient irrigation ditches and seep plugging especially on west side of the valley that recharges the Bitterroot aquifer. 90% of the recharge is from leakage and ditches and seep plugging. We proved this over a 20-year study and this (see exhibit 12) will indicate to you just that. This is not understood by the people who wrote this bill or by the people who are proposing to put it into operation. I suggest in the first place that on most aquifers and most in the valleys here no one knows the extent to which the recharge is dependent upon diversionary flow for agriculture uses. Until this is determined, the bill we have here would create havoc with the whole county. Here the person's well goes dry and the neighbor's, so on, and they don't know why. It's because up the slope

we've leased the water to instream flow. I am strongly for instream flow. I am strongly for diversionary water for ranches and diversionary water to seep into the unconfined aquifers to provide ground water. There's only one way we can do that in the Bitterroot Valley and most of the valleys in western Montana and that is to impound more water."

"Before we do anything like this bill, which is filled with all sorts of ambiguities and unknowns and wishful thinking, let us take twelve of the major contributories of the Bitterroot river and build dams on them. Each one of them you impound about 10 to 12 thousand acre-feet of water. We can pay for them if you wish in any number of ways. Water in California today costs \$2,000 an acre-foot. If we charge \$3 a foot we can pay for one of those dams in 20 years simply by user's fees and that would include fishermen, recreationists, ranches, and the well users."

"Until we impound more water, we are going to be totally without water in August. We don't have low flow in the Bitterroot in August, we have no flow in the tributary rivers. There is no water for the rancher. The aquifers are not being recharged and there is no water for fish. In a situation like that, this sort of law has no meaning. I urge you to not support HB 707."

Carl M. Davis-See exhibit 13. Mr. Davis handed in four signed sheets of opponents. See exhibit 16, 17, 18, and 19.

Representative Vernon Westlake-See exhibit 14.

Ronald F. Waterman-"Philosophically, we oppose this bill simply because of what it does to the existing water law. When a water user declines to use and put water to a beneficial use, that water then becomes subject immediately to junior appropriator rights. There is nothing to lease when you decide not to use it. This bill makes a radical change in 100 years of water law." See exhibit 15 for further testimony.

Richard Gosman-"We stand opposed to this legislation and to the concept of transferring water from off-stream to instream use for the following reasons: Studies made on the Redrock River by the water users irrigation company substantiated by over 40 years of records. They indicate that changing of water use from irrigation to reserving it for instream flow would be self-defeating. The retention of water to the stream

results in a corresponding loss to the under aquifer. A loss in the ability of that aquifer can replenish the stream. We have found on the Redrock--and we believe this is true of most headwater streams, that the cheapest and most efficient means of storage is water applied by the irrigator to lands adjacent to the streams. This irrigation water is returned to the stream in a uniform season-long flow of high quality water...The DNRC has progressively promoted the concept of transfer water use. What we have here is a proponent of a concept who will act as both judge and jury in the hearings involving these protests...This legislation appears to be an attempt by the Department of Natural Resources and Conservation and the Fish, Wildlife, and Parks to attain control over a resource that is vital to agriculture. This concept, as part of the Montana state water plan, has met with wide-spread opposition. In spite of this opposition, the DNRC can formulate proposed legislation to provide for this transfer. This committee consisted of 24 invited participants." See exhibit 36 for further testimony.

Dave McClure-See exhibit 20.

Louise Monroe-See exhibit 21.

Shirley Bugli-See exhibit 35.

Ole Ueland-See exhibit 22.

Walter Steingruber stated he was against HB 707.

Curt Diehl-See exhibit 41.

Eugene Melvey a member of the Headwaters Committee, stated that they opposed HB 707.

Randall Smith-See exhibit 23.

Maynard Smith-"I am also very opposed to this bill."

Bill Garrison-See exhibit 24.

Wilbur Anderson-See exhibit 34.

Nick Schutter-See exhibit 25.

Bill Murphy-"I oppose this bill. Furthermore, even if it does pass, what worries me the most is after the bureaucrats, we will be in worse shape than ever."

Mark Cambridge-"I'm a rancher and I definitely oppose HB 707."

Mark Etchart-"I am in opposition to the bill. I did offer a couple of amendments." See exhibit 26. See exhibit 27 for further testimony.

Pat Barnes stated he opposed HB 707.

Bill Spring-"I'm a manager at Union Ditch. We in the Bitterroot have 1,020 farmers who seriously take their living from water and we're all in a scare. I talked to three or four hundred of these fellows and they're all scared of this bill. I urge you, do not pass this bill." Mr. Spring handed in testimony written by John Robbins from Victor, Montana.

Allen O'Haire-"I'm a rancher south of Livingston and I'm also the chairman of the Park Ranch Union Association. I want to say I am adamantly opposed to HB 707."

Jack Perkins-"I'm chairman of the Deer Lodge Valley Conservation District. We met last night and voted to oppose this bill."

George Vogt-See exhibit 30.

Robert VanDerVere-"Please kill HB 707!"

Jay Chamberlin urged the committee to do not pass HB 707.

Senator Severson-"Water is decreed to land for one thing. Water is not decreed to people, it's decreed to land. It's not for sale. It's not for lease. As far as I'm concerned you can't even give it away. This probably is the greatest departure in water law in the history of Montana. Most streams in Montana are over-adjudicated...If you take water out of that stream or leave water in that stream to run into the Bitterroot River, you're going to hurt somebody. You're going to hurt the junior rights and you're going to hurt those people at the lower end of the creek. The day of big dams is over. But gentlemen and ladies, the day of small dams is not over...I urge you to do not pass this bill." See exhibit 31 for further testimony.

John Bailey handed in testimony. See exhibit 32.

L.M. Powell handed in testimony. See exhibit 33.

Allen Martinell handed in testimony. See exhibit 37.

Donald R. Marble handed in testimony. See exhibits 38 and 39.

Eugene Manley handed in testimony. See exhibit 42.

Questions From Committee Members: Senator Bengtson-"The question Carl Davis had on section 4, part 4, of the bill dealing with the lease must take into account the historical use of the water rights including but not limited to, the usual shutoff. How does that protect the stream? If it needs some clarification, what does it need? Does that address the historical use of the water?"

Representative Iverson-"I assume you are talking about the provision in the bill that attempts at least to make it clear that the only water that can be guaranteed in the stream is that portion of the diverted water that had been consumed. Well, I had the same question and maybe I still do. That section was rewritten several times. It finally, in the form you see it, was rewritten in a form that was satisfactory to the attorneys that we talked to. I'm convinced what it says, is that the only amount of water that can be guaranteed instream is that portion that had been consumed. As I said, that's an important part of the bill. I would caution you though, that section is important enough that if this committee decides to clarify it...Mr. Davis may be right that it needs clarification. Do it carefully and get more than one opinion when you do that. I think it's critical we maintain that provision in the bill."

Senator Bengtson-"Perhaps Mr. Davis could provide to us some clarification to that."

Senator Aklestad-"I have a general question for the public here today. I'm wondering if there is anyone here that would have leased water last year that this bill had been in effect?" One person replied that they didn't have any water to lease. Chairman Beck indicated that there were no hands raised.

Senator Aklestad-"I guess that makes my point, possibly I'm wondering how effective this bill can be. It appears to me that those that are against the bill are the very people that are putting the existing water in Montana to beneficial use at this time and those that are for the bill are the ones that are trying to get additional water to put into at least what I would call a less beneficial use for the State of Montana. Would this be

an enhancement for the economy of Montana? Is that a fair statement?"

Representative Iverson-"I think it is a fair statement Senator Aklestad, but I think you are only half right. I think the people you see in this room are water users that have come from an area where there are specific problems. That's why they're here. That's why they're afraid of it...What you saw from the Bitterroot today is a very clear indication to me that even if the Board of Natural Resources was foolish enough to designate that stream range and even if the fish, wildlife, and parks was foolish enough to decide wastes down there. What you saw today is precisely what's going to happen to that change hearing and it ain't going to happen."

Senator Aklestad-"The proponents of this bill haven't indicated and I'm wondering if they would indicate that this bill put to the proponents, gave to the affect that they would give any assurance that they are not going to bring litigation against the very users that I feel are putting beneficial use to this water at this time or through an initiative process. Have they made any overtures and would they make any overtures along those lines?"

Representative Iverson-"Senator Aklestad, I'm not sure who the people are that might be interested in bringing litigation. I don't know how anyone can fairly ask, if we pass a law that it will never be litigated. I think that is unreasonable to suggest. I will say though, if we do address the instream flow problem in this session, we will greatly diminish the possibility of litigation. I think without some action, it's almost a dead certainty."

Senator Aklestad-"I didn't mean to indicate that you could completely eliminate litigation. You and I both know better than that, because litigation is always available in the State of Montana. I guess what I'm getting at, would those that have been proponents today. Other than talking about officials, would they be willing to indicate that, they would not bring litigation or go through the process of an initiative. Why have they mentioned that at any point in time during all the time putting this bill together?"

Representative Iverson-"Not to me, I don't see really how that could happen. You're talking about a conservation group that may represent thousands of people. I certainly wouldn't ask for it. I think it would be improper for me to put a representative on that kind of spot...It isn't reasonable to promise that someone

won't sue."

Senator Aklestad-"Wouldn't the DNRC look at this if there was a dispute? If that is true, do you have any problem with that?"

Representative Iverson-"I don't have any problem with that, because the dispute we are talking about is the objection process. The Department of Natural Resources, representing the State of Montana, has supported the objection process--the change process as it exists right now. They've done a fine job in my opinion of handling those objections."

Senator Aklestad-"My concern is, I realize that only the department will be able to enter into the lease. But it's the availability of moneys to that department from entities that have far more money than farmers and ranchers, and they would be able to enter into that. The point, is the Fish and Game Committee pays more for ranches at this time, than a rancher would buy that same land for. Why wouldn't they pay more for water, if they'll pay more for land?"

Representative Iverson-"It seems to me the more money the better. I don't really care where it comes from. Whether it's conservation groups or foundations, you might want to decide who could contribute money to this account. The more money they are willing to pay for instream flows. the better as far as I'm concerned. The only person that can end up with that money, in his pocket, is the farmer."

Senator Aklestad-"My concern is that farmer that gets the money or a series of farmers may be drying up wells for several other people in that vicinity."

Representative Iverson-"If return flows weren't accounted for, that would be the case, but I'm convinced that the return flows are very clearly left out of the stream."

Closing by Sponsor: Representative Iverson-"I've been through less controversial hearings and I guess there have been hearings that I have had more fun at than this one. There were some benefits, too. One of the issues that was mentioned as being a particular concern was the damage to you and your users. It seemed to be a threat to ranchers through the whole thing. Because of the fact that only the consumed portion of the water can be maintained instream, I can tell you there will be no adverse affect to junior users or anyone else down the stream. In fact, the only water you're going to see in that stream was water that was never in there

to see in that stream was water that was never in there before."

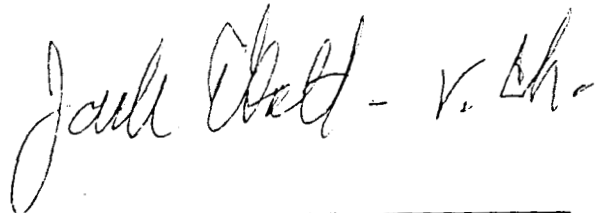
"I might add when you are talking about junior users, that if you remember how these stream reaches work, lets say there is a mile stream that they're concerned about and they lease 30 or 40 acre feet of water. They maintain stream flow in that stretch. Remember there is a beginning and an end to that stretch. After that water leaves that protective stretch, it's going to be open to appropriation--those juniors. So the real the impact on junior users is, you're going to have some junior users below those protective reaches. They're going to have the opportunity to use water they haven't seen in years."

"There could be a tremendous beneficial impact. Take a look at the effective date. It's two years from now. What that means is, the board can go ahead and put together a lease. But that lease can't take effect for two years. I think that's safe. I think that's terribly safe. There won't be a drop of water leased instream until this legislature is back in session."

"If the problems that Carl Davis raised are real, then we can address them...If it turns out this is completely a bad idea, then we'll take it off the damn books. The fact is, it's safe...We seriously need to address instream flows."

ADJOURNMENT

Adjournment At: 3:03 P.M.

A handwritten signature in dark ink, appearing to read "Tom Beck - V. Ch.", is written over a horizontal line.

TOM BECK, Chairman

TB/jj

ROLL CALL

AGRICULTURE COMMITTEE

DATE 3/15/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGSON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

Jess Kilgore
14979 Buffalo Jump Road
Three Forks, Montana 59752
(406) 285-6774

DATE 5/15/89
BILL NO. HB 707
Moster

Montana State Economy

	1985	1986	1987	% of 1987 Total	% increase over 1985
Agriculture	1,469.5	1,479.6	1,716.5	32.	17%
Mining	566.5	587.3	581.8	11.	3%
Gas and Oil	869.3	444.5	456.3	9.	--48%
Travel	850.0	854.3	880.0	16.*	4%
Lumber	735.0	820.0	900.0	17.	22%
Manufacturing	NA	NA	800.0	15.	
			5,334.6		

*Travel: Includes all travel and tourism, Parks, Conventions, Recreation, Skiing, etc.

Agriculture: Average property tax annually 60,557,000.
60,557,000. X 60% = 36,334,000 to school fund
6 mill level - 11,992,414.
Livestock mill levy - 13,770,636.
Total: 86,320,050.
Plus State Income Tax

Cows - calves - 47%
Other livestock -- 9.9%

Total 56.9% of total Agriculture

Water leaving the state annually: 44,000,000 acrae feet.
Water totally consumed in state amounts to: 3,500,000 acre feet.
Agriculture uses 94% of the 3,500,000 acre feet consumed.
Additional storage would help retain more of the water now leaving
the state which would help increase the economy in terms of gross
income for agricutlure as well as fishing and tourism.

Summary

EXHIBIT # 1A
3/15/89 HB 707

The material shown states quite clearly that in the dry years (as 1988) much of the water flowing from August 1 on is water from the water tables created by the irrigation in May and June and part of July that largely was flood waters. We begin to see a shortage of stream flow in late July and all of August and the early part of September. The months of October on through April sees ample stream flow for fisheries as well as refilling storage lakes.

All the streams with storage bear this out. The only exception I could find was in the Ruby two years ago when a much publicized fish kill occurred. This was not lack of water but lack of management. It just wasn't noticed until the damage was done. In 1988, a much drier year, the water for fisheries was entirely adequate and as far as I know will be for the future due to the Ruby Dam.

Landowners don't like to see dry streams any more than do sportsmen. When you consider the volume of return flow in most streams it is easily seen that the irrigation process over the last century has built underground reservoirs to where they are supplying the rivers with water where they would otherwise be dry in years like 1988, as they were in 1934.

The Big Hole River is the only one of the example I have shown that does not have a reservoir. It does have a huge underground reservoir in the irrigated basin between Jackson and Wisdom. This does restore a good flow in the canyon below Wisdom. It is reused in an irrigated area above Dillon and the flow is below what we like.

You have the description of the Red Rock River in great detail. It shows the merit of storage and the return flow from irrigation. This effect goes a long way down stream as the letter from Tom Lane describes the area on the Jefferson River at Three Forks prior to the construction of Clark Canyon Reservoir.

It looks like the water shortage is about a 60 day affair. Diverting water from irrigated use to instream flow will reduce benefits to the state and particularly the schools. The need and the cure is upstream storage to replenish the 60 day shortfall. A study should be made of the potential. I suggest that increasing the capacity of existing storage would be the most economical where it exists. Raising the levels of some high mountain lakes could contribute in the same manner.

In viewing the economics as well as the numbers of people interested in recreation I believe the state should become involved.

The increased storage could be used in maintaining the fishery in the dry years. They should also participate in the cost. During the wet years in most irrigation districts the irrigators could lease the water if it is not needed for instream flow. By this method the users should bear the costs.

The Red Rock River

This analysis of the Red Rock River system is presented by Richard Gosman, a lifetime resident of the valley with 35 years experience operating irrigated ranches on this stream, served as court appointed water commissioner of the Red Rock Decree for 3 years, and currently is on the board of directors of the Water Users Irrigation Company. It has been edited for accuracy by Allen Martinell, President Water Users Irrigation Company, and also a lifetime operator and irrigator on this stream.

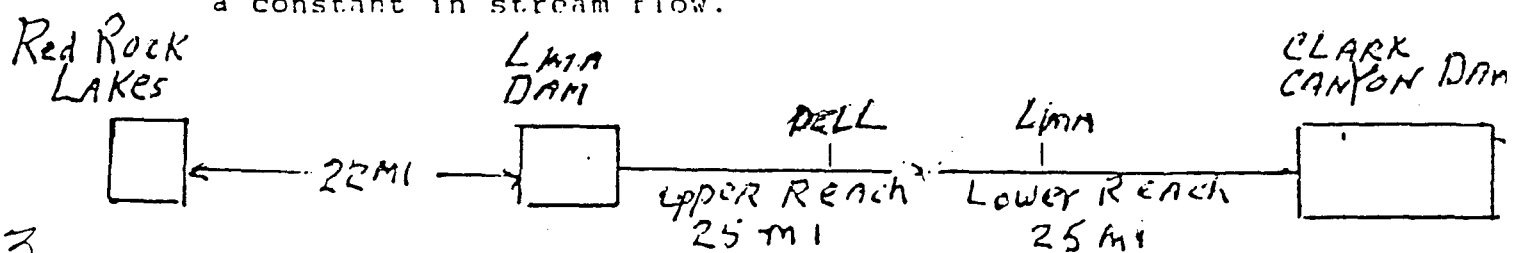
The Red Rock River is typical of many headwater Streams originating in high mountain basins of Montana. Typical in that it is highly appropriated, that a high proportion of the irrigation from it is flood irrigation using a high rate of water application, and in the fact that a high percentage of the water taken from the stream returns to the stream.

The Red Rock River originates in the Red Rock Lakes in the Centennial Valley of southwestern Montana. It follows a meandering course for app. 14 miles to where it flows into the Lima Reservoir. The only irrigation in this upper basin is from tributary streams and is of little consequence. Twice in the 80 year history of the Lima Dam this stream has been dry at its source. Once in the mid 1930's, and again in 1986.

Below the Lima Dam the Red Rock provides irrigation for app. 17,000 acres. It is estimated that app. two thirds of this is flood irrigation using a high rate of water application (estimates vary from 4 to 10 acre feet per acre per season).

Below the Lima Dam the river can be divided into two separate reaches. The upper reach extends for app. 25 miles. This section is characterized by little return flow, and is highly water consumptive. A large portion of the Lima Dam releases are used from this stretch of the river. Despite high irrigation demands this reach of the river has only been completely dewatered during the two dry years previously mentioned.

The lower reach extends for another 25 miles to its termination in Clark Canyon Reservoir. It is fed by many springs arising from a ground water aquifer which is directly charged by irrigation from the upper reach of the river. Two to three weeks after irrigation commences the return flow provides nearly all irrigation needs on the lower reach and insures a constant in stream flow.



The accompanying graphs point out the part played by irrigation in levelling off the stream flow, and insuring a constant more uniform flow in the lower reach. Of particular significance is the 1988 season. The Red Rock was dry at its source from June 2. The Lima dam discharges were high from storage through June 28 at which time the gates were lowered to release only natural flow (app. 17 C.F.S.). This decreased until the gates were completely closed on Aug. 26 and the Red Rock was dry from its source to about 25 miles below Lima Dam.

During all this time the lower reach of the river maintained a constant flow of at least 102 C.F.S. and at the same time provided normal irrigation needs to users on this portion of the stream. If any significant amount of water had been reserved for instream flow during the early run off, that water would have been lost to the system and flows in the lower reach would have been reduced by at least that amount.

No amount of instream reservation would provide water for any portion of the stream once it became dry. It did not go dry because of irrigation demands. There just wasn't any water.

During the 1939 season a Mr. N. W. Blindauer, Irrigation Engineer made a study of the Red Rock River and in his report states, quote. " July 19, 1939 complete measurements of river at both ends as well as all river ditches were made by the U. S. Geological Survey between reservoir outlet and Scotts bridge above Armstead. A test for this stretch showed a gain of 57% from backflow. Aug. 18 a similar test was conducted by the same department from Barrats gauging station to Point of Rocks. This reach of river gained over 100% from backflow." He further states, " Part of the function of irrigation water on a stream is to hold the ground water up to a point where the river will flow."

In summary; On headwater streams supplying irrigation to high mountain valleys where nearly all the irrigated land is in close proximity to the stream, our experience and documentation show that transfer of water from offstream use to an instream reservation would be detrimental to sustaining season long stream flows. Occasional dewatering of short reaches on these streams may occur. This is a trade off that may have to be made to insure flows in other reaches. Increase in storage on upper drainages would certainly alleviate much of this problem.

1982

Releases from Lima Dam in
acre Feet Per MonthRed Rock River at Clark Canyon
Dam in Acre Feet per month.

Jan.	818-----	10,914
Feb.	739-----	9,154
Mar.	818-----	10,626
Apr.	4,422-----	14,410
May	24,358-----	25,302
June	37,543-----	14,486
July	40,108-----	15,726
Aug.	31,418-----	11,102
Sept.	4,404-----	11,956
Oct.	814-----	15,770
Nov.	6,357-----	14,710
Dec.	4,083-----	13,190

155,882	+	11,464	=	167,346
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1988

Releases from Lima Dam in
acre Feet Per MonthRed Rock River at Clark Canyon
Dam in Acre Feet per month.

Jan.	1,015-----	13,289
Feb.	497-----	11,501
Mar.	318-----	13,784
Apr.	1,369-----	11,436
May	12,618-----	7,552
June	21,688-----	7,552
July	1,178-----	9,671
Aug.	302-----	9,281
Sept.	0-----	6,270
Oct.	0-----	8,410

39,287	+	64,090	=	103,377
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This is probably the driest year in 50 years. The return flow differential has moved back a month to August. This has to be from the water table created in the preceding wetter years. Note also that in 1973 and 1982 there was a much higher volume of water than in the earlier years. This suggests to me that it takes years to build the underground reservoir and also that we may expect a lesser flow into Clark Canyon until September even if we have a wet winter which will refill Lima Reservoir.

Value of Water (Hay Ranch)

100 acre feet - Alfalfa -

50 acres = 4 tons/acre = 200 tons X \$50/ton = \$10,000.
\$10,000 ./ 100 acre feet = \$100/ per acre foot water.

The same 100 acre feet is not totally consumed.

80 acre feet returned to stream and next user.

40 acres X 4 tons = 160 tons X \$50 = \$8000.

64 acre feet returned to down-stream users

32 acres X 4 tons = 128 tons X \$50 = \$6400.

50 acre feet returned to down stream users.

25 acres X 4 tons = 100 tons X \$50 = \$5000.

29,400.

Water is used and reused above on the basis of 40% consumption.

100 acre feet has a total value of \$294/acre foot.

\$294 is based on \$50 hay. Present market price is \$90 to \$100 per ton.

Value of Water (cow calf ranch)

100 acre feet:

50 acres X 4 tons = 200 tons of hay

200 tons = 100 cows = 90 calves X \$450 = 40,500.

80 acre feet:

40 acres X 4 tons = 160 tons of hay

160 tons = 80 cows = 72 calves X \$450 = 32,400.

64 acre feet:

32 acres X 4 tons = 128 tons of hay

128 tons = 64 cows = 58 calves X \$450 = 26,100.

50 acre feet:

25 acres X 4 tons = 100 tons of hay

100 tons = 50 cows = 45 calves X \$450 = 20,250.

119,250.

119,250. gross income from 100/acre ft. water = \$1192/acre ft.

Above based on current livestock values.

Above based on re-use of water 3 times and that 20% of the water each time will be totally consumed by the crop. The balance of the water will be in the water table. (40%)

Ex #1A
HB 707
3-15-89

Value of Water

In other statements to meetings and water hearings I have stated that at least half or more of the value of a cow-calf ranch unit is due to the possession and use of a water right and its use in the business.

I have arrived at a value of an acre foot of water based on the sale of calves at present market prices to be \$1192. per acre foot.

Ranch properties currently are selling at about \$2000 per cow unit if the ranch property is well balanced and has an adequate water right and land to produce approximately 2 tons of hay per cow.

200 cow unit at \$2000 per animal unit = \$400,000. Without the water right to produce winter feed the carrying capacity will be reduced by more than 50%.

50 % of the value = \$200,000.

200 acre feet of water = $200 \times \$1192 = \$238,400$.

It seems to be borne out by the above figures that an acre foot of water does have a value close to the \$1192 figure. This is the open market value approach to determine values.

3/15/89

HB 465

HB 707

BILL SUMMARY--SENATE AGRICULTURE COMMITTEE
MARCH 15, 1989
PREPARED BY DOUG STERNBERG, COMMITTEE STAFF

HB 465 Section 1: adds definition of "immediate resale" and revises definition of "livestock dealer" for purposes of the Livestock Marketing Act

Section 2: requires proof of a USDA bond for licensure as a livestock dealer

Section 3: deletes requirement of a state bond as a criteria of livestock dealer license issuance or renewal

Section 4: removes state bond as a criteria for livestock dealer license termination

Section 5: adds requirement that a livestock dealer supply a current financial statement to the department upon request rather than annually

Section 6: deletes internal reference to repealed section

Section 7: repeals section that established requirements of the state livestock dealer bond

Section 8: extends present agency rulemaking authority

Section 9: provides immediate effective date

HB 707 Section 1: adds department of fish, wildlife, and parks streamflow lease to definitions of "appropriate" and "beneficial use" in the surface and groundwater law

Section 2: adds an exception for FWP streamflow leases not requiring appropriation works from the proof of adequacy necessary for approval of a change in appropriation rights

Section 3: provides that a FWP streamflow lease does not constitute abandonment of the lessor's appropriation right

Section 4: allows FWP, after July 1, 1991, to lease existing water rights to maintain or enhance streamflows during critical low flow periods; establishes lease application requirements; limits lease quantities to the lessor's historical amount or less; outlines criteria for lease term, modification or revocation, priority of appropriation and reversion; provides that a person issued a water use permit that is junior to the FWP lease may not object to exercise of the FWP lease; requires FWP to pay costs of monitoring

Section 5: requires DNRC designation of leasable streams and limits leasing to 10 streams in the state

Section 6: allows FWP to accept public and private contributions for leasing and development and provides for expenditure of the funds

Section 7: requires DNRC (as indicated in title) to report to each legislature concerning operation of the leasing program

Section 8: extends present agency rulemaking authority

Section 9: codifies sections 4 & 5 in DNRC law; codifies section 6 in FWP law

Section 10: terminates the leasing program October 1, 1999.

QUESTIONS AND ANSWERS ON THE INSTREAM FLOW LEASING BILL

SENATE
EXAMINED BY
THE HOUSE OF
DATE REPRESENTATIVE

BILL NO. HB 707

WHAT IS THE PURPOSE OF THE BILL?

The purpose of the instream flow leasing bill is to allow the Department of Fish, Wildlife and Parks (DFWP) to lease water rights from willing individuals or groups to maintain or enhance free-flowing water in certain streams for fish, wildlife, and recreation (Section 4(1)). Several of these points should be emphasized.

First, the only entity that is allowed to lease water for instream flow purposes is the DFWP. However, other public and private agencies are allowed to contribute funds and other resources to the DFWP for the purpose of leasing water for instream flow protection (Section 6).

The DFWP may also accept contributions for developing water storage to maintain or enhance stream flows (Section 6(1)(B)). The DFWP must expend such contributions exclusively for such storage facilities unless otherwise authorized under Section 87-1-514, MCA (Section 6(4)).

Second, the DFWP may only lease water only from "willing" parties. No one will be forced to lease water to the DFWP for instream flow purposes.

Third, the DFWP may lease water from willing parties to both maintain existing resources as well as to enhance or increase instream flows in dewatered streams. While the bill provides the DFWP an alternative mechanism to maintain existing instream resources (in addition to the reservation process (Section 85-2-316, MCA) and water storage), it is most likely to be used to enhance instream flows in dewatered streams.

Fourth, the DFWP's opportunity to lease water for instream flow purposes is limited to only 10 stream reaches identified by the DFWP and approved by the Board of Natural Resources and Conservation (Section 5). Fifth and finally, the DFWP may only lease water to protect and manage fish, wildlife, and recreational resources.

HOW DOES THE BILL PROTECT EXISTING WATER RIGHTS?

First, the DFWP can only lease water from a "willing" party. That is, instream flow leases are voluntary; they are not required and do not result in the confiscation of water rights without compensation. Where the two parties cannot be mutually benefited, a lease arrangement makes bad economic sense and is not likely to be entered into.

Second, according to the "Statement of Intent," it is anticipated that the DFWP will meet with appropriators along selected stream reaches to assess and consider any concerns before proceeding with an instream flow lease.

Third, the DFWP must provide the Board of Natural Resources and Conservation (BNRC) with a list of specific stream reaches on which leasing is desired (Section 5). The BNRC must then declare or designate only 10 stream reaches where instream flow leases may occur if it finds that leasing is necessary. Individuals or groups with existing water rights would have an opportunity to express their concerns before the Board regarding instream flow leases on particular stream reaches.

Fourth, a proposal for an instream flow lease must be processed through the same change of use proceeding as other water right changes and transfers (Section 2). In short, this means that individuals with water rights would have an opportunity to object to the lease and to provide evidence on how and why the lease would adversely affect the use of their water right. If a proposed lease would result in an adverse affect, it would not be allowed.

Fifth, the Department of Natural Resources and Conservation (DNRC) maintains jurisdiction to modify or revoke the lease during the lease period if third parties provide new evidence that the lease adversely affects the use of their water right (Section 4(6)).

HOW WILL THE BILL AFFECT FUTURE WATER PERMITTEES?

An individual or group that applies for and receives a water use permit with a priority date after the date of the instream flow lease authorization would not be allowed to object to the exercise of the lease, the renewal of the lease, or the reversion of the appropriation right to the lessor (Section 4(9)). This is consistent with the prior appropriation doctrine ("first in time, first in right"), and does not constitute a change in Montana's water law.

HOW MUCH OF AN EXISTING WATER RIGHT IS LEASABLE?

The amount of water that may be leased from an existing water user for instream flow purposes is generally up to the lessor and the DFWP. However, the maximum quantity of water that may be leased is the amount historically diverted

by the lessor; only the amount historically consumed may be leased below the lessor's point of diversion (Section 4(4)). The DNRC may specify in the lease authorization that an amount of water smaller than that historically consumed by the lessor is leasable.

An instream flow lease must take into account the historical use of the water right, including but not limited to the shutoff of a diversion associated with a water right under normal irrigation practices, harvesting, climatic conditions, and cooperative practices with other irrigators (Section 4(4)).

HOW WILL THE LENGTH OF THE STREAM REACH TO WHICH THE LEASE APPLIES BE IDENTIFIED?

The length of stream reach to which an instream flow lease applies is generally up to the lessor and the DFWP. However, specific information on the length and location of the stream reach must be included in the instream flow lease authorization (Section 4(3)). In addition, the DNRC may establish the streams and stream reaches where leasing may occur.

HOW WILL THE INSTREAM FLOW BE MEASURED?

The details for measuring a leased instream flow are up to the DFWP. However, a lease authorization must include an instream flow measuring plan that describes the points where and the manner in which the instream flow will be measured (Section 4(3)).

The DFWP must pay all the costs associated with installing measuring devices or providing personnel to measure streamflows according to the measuring plan (Section 4(10)).

HOW LONG IS THE LEASE PERIOD?

An instream flow lease may be authorized by the DNRC for no more than 10 years (Section 4(5)). The lease may also be renewed (for up to 10 years per renewal) if nobody objects to the renewal and provides new evidence showing how the lease adversely affects the use of a water right, and if the leasing statute is recodified after the 10 year sunset provision.

HOW OFTEN MAY THE LEASE BE EXERCISED?

The DFWP may lease existing water rights only during critical low flow periods (Section 4(1)).

WHAT IS THE PRIORITY DATE FOR AN INSTREAM FLOW LEASE?

As in any water right change, the priority date for an instream flow lease authorization is the same as the priority of appropriation of the water right that is leased (Section 4(7)).

WHO MAY ENFORCE INSTREAM FLOW LEASES?

According to the "Statement of Intent," the lessor is responsible for taking action, if necessary, to protect the instream flow lease. However, the "Statement of Intent" goes on to say that the lessor and the DFWP may agree to different arrangement if agreeable to both parties.

WILL A LEASED WATER RIGHT BE CONSIDERED ABANDONED?

In leasing an existing water right, the lessor does not abandon any part of the right (Section 3(4)).

WHEN CAN THE DEPARTMENT OF FISH, WILDLIFE AND PARKS BEGIN TO LEASE WATER RIGHTS?

The DFWP may not enter into a lease before July 1, 1991 (Section 4(1)). This will allow the DFWP and the DNRC to identify specific stream reaches where instream flow leases are needed and to determine if there are any parties willing to lease water. It will also give the legislature an opportunity to review the leasing program during the 1991 session before any leases are authorized.

REPORT TO THE LEGISLATURE

The DNRC must report to each regular session of the legislature on the operation of the instream flow leasing program (Section 7).

March 15, 1989

Policy Advisor
on Natural Resources

This bill is a compromise. And like a good compromise, no one is ~~really~~ ^{completely} happy with it.

For two months I've been working on water leasing. Sometimes I've felt like the process has been haunted by the ghost of water past--which is stream access--and the ghost of water future--which is the public trust doctrine.

~~There's a mistake. Those ghosts are with us in the past and today.~~

And the bill before you, in part, is a response to the past and to the future. And this bill has a lot of good things going for it.

It is small in scope--a water leasing pilot project.

It is completely voluntary.

Not one drop of water will be confiscated under this bill.

There's no sales under this bill...just leases.

There is a great deal of public involvement built in the leasing process under this bill.

No lease can take place until 1991, so the state can fine tune any leasing process approved here.

And we are maximizing our most precious resource--water.

I would add that if the Governor thought this bill in any way hurt agriculture--he would have me here opposing the bill and opposing it strenuously. The Governor is determined to pursue a progressive and responsible state water policy which recognizes the needs of all water users. The leasing of water might be a part of that policy. Can we protect instream flows with leasing? That question deserves an answer.

Like many of the people in this room, the Governor wants to pursue water storage. In fact, two years from now I hope we are all here to discuss the Governor's water storage. ~~plan~~ The next water plan will examine water storage. *Stephens Plan for*

Finally, one argument against this bill--and I heard this a lot--is that it allows the camel's nose to get under the tent. Except in this case the camel's nose isn't a group, or a cause, or a concept. In this case maybe the camel's nose represents the future. ~~the camel's nose represents the future.~~

HB 707
March 15, 1989

Testimony presented by Ron Marcoux, Department of Fish, Wildlife and Parks

Montana's streams provide numerous benefits to the people of this state. Many of these benefits result when water is put to use off the stream, but many others also occur from instream flows. These include clean drinking water, hydroelectric power, dilution for industrial discharges, recreation, and benefits for fish and wildlife.

The past several drought years have clearly demonstrated how water shortages can affect all the users.

Because Montana is a diverse state, the tools needed to manage and allocate our waters must also be diverse. Montana's modern water laws, as they have evolved since 1973, provide flexibility while protecting existing users.

Water management tools must also be diverse because no single mechanism will solve water shortages. Some claim that storage is the only answer. Storage does have its role, but is not appropriate or cost effective in all cases.

HB 707 can provide a mechanism to keep streamflows from reaching critically low levels in some streams. Like storage, water transfers are not the answer for all streams. However, HB 707 provides an opportunity for willing water right holders to lease water if other existing water users are not adversely affected.

At the present time water can be transferred from any consumptive use to another consumptive use through a change-of-use hearing. There have been comments that would lead one to believe such changes of use cannot occur without adverse impacts. However, they occur today. The main difference with water leasing is that this water will be left instream for a predetermined distance. Our experience in the Bitterroot Valley indicates this can be done. Although the instream water in the Bitterroot comes from storage, we have demonstrated our ability to work with local irrigators, the Conservation District, conservationists and the district court to deliver the water downstream. In fact, the increased flow has also benefited irrigators along this reach of stream.

The process set forth in this bill is similar to other change-of-use proceedings. The opportunity to identify potential conflicts can and should occur up front. If a particular lease appears too complex, the department would pursue other leases or other options. Because leases can only occur during low flow periods, the water not consumed at the lease site will very likely be put to use by agricultural users downstream from the leased area. Thus not only is the lessor directly compensated, but downstream agricultural

users will benefit during a period when they are likely to otherwise experience water shortages.

The bill provides a limited scope of leasing while the program is being evaluated. There are many safeguards built into this bill. While these safeguards will make the process more complex and cumbersome, we believe the process is workable. The department feels the ability to lease water for instream purposes is an important mechanism to alleviate some of the problems on our dewatered streams, and offers its support to HB 707.



DATE 3/13/89 FEB 17 1989
BILL NO. HB 707
Grosfield MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

1301—20th Street South / Great Falls, Montana 59405 / (406) 761-8210

February 15, 1989

Rep. Bob Raney, Chairman
House Natural Resources Committee
Capitol Station
Helena, MT 59620

Dear Rep. Raney:

On February 9, 1989, the Board of Natural Resources and Conservation approved four sections of the Montana State Water Plan. One of these sections is titled "Instream Flow Protection," and one of its recommendations is for the Legislature to change the law to allow leasing of off-stream water rights to maintain or enhance instream flows.

By the time this letter reaches you, a bill to accomplish this will have been introduced and referred to the House Natural Resources Committee (LC634/1663). An unproofed draft of this bill was reviewed by the Board on February 10, and a motion expressing the Board's support for this bill was unanimously approved.

The water leasing portion of the state water plan engendered much public discussion and controversy. The Board of Natural Resources and Conservation did not approve it lightly. Public comment has included nine public meetings, three public hearings, and receipt of over two hundred letters. Additionally, the Board conducted its own hearing. After carefully considering the alternatives, water leasing emerged as the preferred choice. The draft water leasing bill reviewed by the Board provides an additional method to protect Montana's natural resources that are dependent on instream flow without harming the economic interests dependent on existing water rights.

In sum, the Board supports the water leasing bill before your committee. It is a fair and balanced approach, and it includes clear protection for current water rights holders and safeguards against the uncertainties surrounding implementation of a new water management technique.

Ex. 5

3/15/89

Rep. Bob Raney February 15, 1989 Page 2.

I am sure that as Chairman of the House Natural Resources Committee you will see that this bill receives the fair and timely hearing it deserves.

Sincerely,

A handwritten signature in cursive script that reads "William A. Shields".

William A. Shields, Chairman
Board of Natural Resources and Conservation

cc: Governor Stan Stevens
Karen Barclay
BNRC Members

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON HOUSE BILL 707

DATE 3/15/89
BILL NO. HB 707
Barkley

March 15, 1989

A BILL FOR AN ACT ENTITLED: " AN ACT PROVIDING FOR LEASING OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING STREAMFLOWS FOR FISH, WILDLIFE, OR RECREATION, ETC.

The Department of Natural Resources and Conservation supports House Bill 707 as amended by the House of Representatives. The legislation would implement a recommendation of the state water plan that addresses streams having significant instream values and yet subject to regular or periodic low flow conditions. Other water plan recommendations to deal with this circumstance include pursuing local cooperative solutions, such as the sharing of water shortages and irrigation scheduling; providing for water storage releases, as is already being done from Painted Rocks Reservoir for the Bitterroot River; and evaluating the potential for developing additional water storage facilities to meet both instream and offstream water use needs.

None of these options is a panacea for solving stream dewatering problems. Rather, each should be considered as a tool for addressing the problem. Each of these tools has its own particular applicability and limitations. Water leasing may be the best tool for the job of solving dewatering problems in some areas.

The state water plan recommendation on water leasing was the result of considerable public input and debate. Participants in the discussion included a broad-based Instream Flow Technical Advisory Committee, the State Water Plan Advisory Council, the Board of Natural Resources and Conservation, the legislature's Water Policy Committee, several special interest groups, and about 2,500 people attending 12 public meetings on the plan.

This bill embodies a "walk-before-you-run" approach. It is purposely a constrained bill in that it doesn't allow private entities to lease water for instream flow purposes nor does it allow for the purchase (or permanent transfer) of a water right for instream uses. It further limits leasing to ten streams in Montana. Yet, the bill can make a difference and can accomplish the principle objective of protecting valuable instream resources at times when they are most threatened.

Ex. #6
3/15/89
HB 707

The bill amends existing Montana water law by allowing instream uses to be considered along other water uses. That is, existing water rights may currently be changed or transferred, but only from one offstream use to another. This bill would treat all water users more fairly by allowing instream flow purposes to be fulfilled when and where willing parties would enter into instream flow lease agreements.

Instream flow leases would be subject to the same change of use requirements that other transfers must satisfy, and additional requirements that are justified by the different nature of an instream water right. These will not be easy requirements to meet but they are necessary to protect all existing water users. I can assure you that such matters as quantifying the consumptive part of a water right or return flows are very complex and difficult, but they are matters with which the department has experience and ones that have to be carefully considered in any other change of use proceeding. If it were found that a proposed lease arrangement would harm an existing water right, the lease would not be authorized.

In conclusion:

1. Water leasing would operate within the framework of Montana's prior appropriation water rights doctrine.
2. All existing water rights would be recognized and protected.
3. Only willing parties would ever be involved in the leasing of water for instream flow purposes.
4. Like reservoir storage, leasing would represent a water management tool that may help sustain important natural resources during low flow conditions.
5. Also, like storage, leasing would not be a panacea and would not be applicable in all circumstances.
6. Finally, water leasing would be very limited in scope and allow the state to approach this matter in a positive, yet cautious manner.

HB707 IVERSON MAR. 15, 1989
MONTANA WATER RESOURCES ASSOCIATION, JO BRUNNER, EX. SEC.
SENATE AG. SUPPORT X AMEND OPPOSE

Mr. Chairman, The Montana Water Resources Association has wrestled long and hard with this bill. Our members have had, and will continue to have very strong feelings, both pro and con on the leasing of water.

The MWRA legislative committee has voted to support HB707, with reservations, but some of our members will be here today in opposition, and we want you to understand that we have encouraged them to present their thoughts and concerns to this committee. We believe that only through earnest participation and thorough discussion do good bills and laws come about.

While the Association does support HB707, at this time, it is with reservations. We continue to have very deep rooted concerns with such a drastic change in Montana water law, but realize the potential for water right holders in circumstances that will prove beneficial not only for themselves, but in maintaining our natural habitat.

MWRA certainly approves the amendments, as we received them, prior to this meeting. It is our conviction that the parties benefiting by the lease provisions should be responsible for adverse affects to others and these amendments hopefully will alleviate our concerns.

We have a problem with the lack of adequate measuring systems, and with inadequate definitions or the reach of use for leased water, and will continue to work toward and support wording we feel will take care of those problems.

MWRA has been deeply involved with all aspects of the State Water Plan, our immediate past president serves on the Council and several of our members served on the Technical Advisory committees, as I did, with the meetings held around the state, on the informal lease plan committee and in the formulation of this bill, and amendments.

We continue to believe that many of the problems addressed by advocates of instream preservation can, and will be solved by the construction of storage facilities. This is not just an assumption, we only have to look to existing facilities and their uses to see the need for further facilities on our streams.

It is the intent of the Montana Water Resources Association to continue to work with those who will be involved in this process, should the bill pass or not, and to closely monitor any developments, good or bad as the case may be. We recognize that this is not a one shot issue, that all areas of the Montana Water Plan will continue over the years, and we intend to be involved to the fullest in the many facets of the programs.

Thank You.

PROPOSED AMENDMENTS TO HB 707
(Third reading copy -- blue)
Prepared for the Senate Committee on Agriculture
March 14, 1989 Draft

1. Title, lines 8 and 9.

Following: "PURPOSE OF"

Strike: "ENHANCING OR MAINTAINING"

Insert: "PROVIDING"

2. Title, line 9.

Following: "FOR"

Strike: remainder of line 9

Insert: "THE BENEFIT OF FISHERIES"

3. Page 2, line 2.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

4. Page 2, line 3.

Following: line 2

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

5. Page 2, lines 6 and 7.

Strike: "enhance" on line 6 through "recreation" on line 7

Insert: "provide for fisheries"

6. Page 2, line 9.

Following: "parks"

Insert: "that have the approval of the fish and game commission"

7. Page 3, line 4.

Following: "conservation"

Strike: "will"

Insert: "with the consent of the board shall"

8. Page 3, lines 23 and 24.

Following: "authorization" on line 23

Strike: remainder of line 23 through "contract" on line 24

9. Page 4, line 2.

Following: "conservation"

Strike: "should"

Insert: "with the consent of the board shall"

10. Page 4, line 5.
Following: "are not"
Strike: "or probably will not be"

11. Page 5, line 17.
Following: line 16
Insert: "(6) "Commission" means the fish and game commission
provided for in 2-15-3402."
Re-number: subsequent subsections

12. Page 14, line 13.
Following: "to"
Strike: "enhance or maintain"
Insert: "provide"

13. Page 14, line 14.
Following: "for"
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

14. Page 14, line 16.
Following: "parks"
Insert: ", with the consent of the commission, "

15. Page 14, lines 17 and 18.
Following: "of" on line 17
Strike: "maintaining or enhancing"
Insert: "providing"
Following: "for" on line 17
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

16. Page 14, line 22.
Following: "department"
Insert: "with the consent of the board"

17. Page 14, line 23.
Following: "of"
Strike: "maintaining or enhancing"
Insert: "providing"

18. Page 14, line 24.
Following: "for"
Strike: "fish, wildlife, or recreation"
Insert: "the benefit of fisheries"

Ex. #8
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HB 707

PROPOSED AMENDMENTS, HB 707
page 3 of 5

19. Page 15, lines 5 and 6.

Following: "streamflow" on line 5

Strike: "will" through "enhanced" on line 6

Insert: "shall be provided"

Following: "must" on line 6

Strike: "provide"

Insert: "include"

20. Page 15, line 8.

Strike: "will"

Insert: "shall"

21. Page 15, line 14.

Following: line 13

Strike: "enhance or maintain"

Insert: "provide"

22. Page 15, line 21.

Following: line 20

Insert: "(5) The department of fish, wildlife, and parks shall have the responsibility to prove to the board by substantial credible evidence that a proposed lease authorization does not adversely affect existing water rights. The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."

Renumber: subsequent subsections

23. Page 16, line 4.

Strike: "(9)"

Insert: "(10)"

24. Page 16, line 6.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of their lease, and the costs of proving the adverse effects including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

25. Page 16, line 8.

Following: "department"

Insert: "with the consent of the board"

PROPOSED AMENDMENTS, HB 707
page 4 of 5

26. Page 16, line 10.

Strike: "(9)"

Insert: "(10)"

Following: "by"

Strike: "substantial credible"

Insert: "a preponderance of the"

27. Page 16, line 11.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of their lease, and the costs of proving the adverse effects including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

28. Page 17, line 5.

Following: "parks,"

Strike: "in consultation with the department"

Insert: "with the consent of the commission"

29. Page 17, line 7.

Following: "to"

Strike: "maintain or enhance"

Insert: "provide"

30. Page 17, line 12.

Following: line 11

Strike: "maintain" through "recreation"

Insert: "provide for fisheries"

31. Page 17, line 14.

Insert: "(3) Upon declaring a stream reach eligible for leasing, the board shall request the department to prepare an analysis concerning whether longer term solutions to the critical low flows in the stream reach are feasible. Longer term solutions to be considered include storage enhancement or development and recharge from ground water sources. The preparation of or recommendations resulting from the analysis may not preclude, inhibit, or delay the negotiation or implementation of leases on the stream reach as provided in [section 4]."

ReNUMBER: subsequent subsection

Ex. #8
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HB 707

PROPOSED AMENDMENTS, HB 707
page 5 of 5

32. Page 17, lines 21 through 23.

Following: "to" on line 21

Strike: "maintain" on line 21 through "enhance" on line 22

Insert: "provide"

Following: "for" on line 22

Strike: remainder of line 22 through "purposes" on line 23

Insert: "the benefit of fisheries"

33. Page 17; line 24 through page 18, line 1.

Following: "TO" on line 24

Strike: remainder of line 24 through "ENHANCE" on line 25

Insert: "provide"

Following: "STREAMFLOWS" on line 25

Strike: remainder of line 25 through "PURPOSES" page 18, line 1

34. Page 18, line 8.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

35. Page 18, line 9.

Following: "flows"

Strike: "for" through "recreation"

36. Page 18, lines 14 and 15.

Following: "TO" on line 14

Strike: "MAINTAIN OR ENHANCE"

Insert: "provide"

Following: "STREAMFLOWS" on line 14

Strike: remainder of line 14 through "PURPOSES" on line 15

37. Page 18, line 19.

Following: second "DEPARTMENT"

Insert: "with the consent of the board"

Gray House Bill No. 707 -- Unofficial
March 17, 1989

1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
3 ~~MAINTAINING~~ PROVIDING STREAMFLOWS FOR FISH, WILDLIFE, OR
4 ~~RECREATION~~ THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR DEVELOPING
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."
14
15

16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish;
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.

25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation ~~will~~ WITH THE
8 CONSENT OF THE BOARD, SHALL review the proposed leases for a single
9 stream reach in one proceeding, though the potential for another set of lease
10 applications at a future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.

30
31 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

32 Section 1. Section 85-2-102, MCA, is amended to read:

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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1 (1) "Appropriate" means to:

2 (a) divert, impound, or withdraw (including by stock for stock water) a
3 quantity of water; or,

4 (b) in the case of a public agency, to reserve water in accordance with 85-
5 2-316; or

6 (c) in the case of the department of fish, wildlife, and parks, to lease water
7 in accordance with [section 4].

8 (2) "Beneficial use", unless otherwise provided, means:

9 (a) a use of water for the benefit of the appropriator, other persons, or the
10 public, including but not limited to agricultural (including stock water), domestic,
11 fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational
12 uses; and

13 (b) a use of water appropriated by the department for the state water
14 leasing program under 85-2-141 and of water leased under a valid lease issued
15 by the department under 85-2-141; AND

16 (C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND
17 PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

18 (3) "Board" means the board of natural resources and conservation
19 provided for in 2-15-3302.

20 (4) "Certificate" means a certificate of water right issued by the department.

21 (5) "Change in appropriation right" means a change in the place of
22 diversion, the place of use, the purpose of use, or the place of storage.

23 (6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED
24 FOR IN 2-15-3402.

25 (6)(7) "Declaration" means the declaration of an existing right filed with the
26 department under section 8, Chapter 452, Laws of 1973.

27 (7)(8) "Department" means the department of natural resources and
28 conservation provided for in Title 2, chapter 15, part 33.

29 (8)(9) "Existing right" means a right to the use of water which would be
30 protected under the law as it existed prior to July 1, 1973.

31 (9)(10) "Groundwater" means any water beneath the land surface or beneath
32 the bed of a stream, lake, reservoir, or other body of surface water, and which
33 is not a part of that surface water.

34 (10)(11) "Permit" means the permit to appropriate issued by the department

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1 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

15 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

16 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

17 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter
18 7.

19 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
20 however made, by which groundwater is sought or can be obtained or through
21 which it flows under natural pressures or is artificially withdrawn."

22 Section 2. Section 85-2-402, MCA, is amended to read:

23 "85-2-402. Changes in appropriation rights. (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

26 (2) Except as provided in subsections (3) through (5), the department shall
27 approve a change in appropriation right if the appropriator proves by substantial
28 credible evidence that the following criteria are met:

29 (a) The proposed use will not adversely affect the water rights of other
30 persons or other planned uses or developments for which a permit has been
31 issued or for which water has been reserved.

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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1 (c) The proposed use of water is a beneficial use.

2 (3) The department may not approve a change in purpose of use or place
3 of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5
4 or more cubic feet per second of water unless the appropriator proves by
5 substantial credible evidence that:

6 (a) the criteria in subsection (2) are met;

7 (b) the proposed change is a reasonable use. A finding of reasonable use
8 must be based on a consideration of:

9 (i) the existing demands on the state water supply, as well as projected
10 demands of water for future beneficial purposes, including municipal water
11 supplies, irrigation systems, and minimum streamflows for the protection of
12 existing water rights and aquatic life;

13 (ii) the benefits to the applicant and the state;

14 (iii) the effects on the quantity and quality of water for existing uses in the
15 source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for
17 which application has been made;

18 (v) the effects on private property rights by any creation of or contribution to
19 saline seep; and

20 (vi) the probable significant adverse environmental impacts of the proposed
21 use of water as determined by the department pursuant to Title 75, chapter 1,
22 or Title 75, chapter 20.

23 (4) The department may not approve a change in purpose of use or place
24 of use for a diversion that results in 4,000 or more acre-feet of water a year
25 and 5.5 or more cubic feet per second of water being consumed unless:

26 (a) the applicant proves by clear and convincing evidence and the
27 department finds that the criteria in subsections (2) and (3) are met; and

28 (b) the department then petitions the legislature and the legislature affirms
29 the decision of the department after one or more public hearings.

30 (5) (a) The state of Montana has long recognized the importance of
31 conserving its public waters and the necessity to maintain adequate water
32 supplies for the state's water requirements, including requirements for reserved
33 water rights held by the United States for federal reserved lands and in trust for
34 the various Indian tribes within the state's boundaries. Although the state of

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1 Montana also recognizes that, under appropriate conditions, the out-of-state
2 transportation and use of its public waters are not in conflict with the public
3 welfare of its citizens or the conservation of its waters, the following criteria must
4 be met before out-of-state use may occur:

5 (b) The department and, if applicable, the legislature may not approve a
6 change in appropriation right for the withdrawal and transportation of appropriated
7 water for use outside the state unless the appropriator proves by clear and
8 convincing evidence and, if applicable, the legislature approves after one or
9 more public hearings that:

10 (i) depending on the volume of water diverted or consumed, the applicable
11 criteria and procedures of subsection (2) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water
13 conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
15 public welfare of the citizens of Montana.

16 (c) In determining whether the appropriator has proved by clear and
17 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
18 will be met, the department and, if applicable, the legislature shall consider the
19 following factors:

20 (i) whether there are present or projected water shortages within the state of
21 Montana;

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

27 (iv) the demands placed on the applicant's supply in the state where the
28 applicant intends to use the water.

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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1 the department shall give notice of the proposed change in accordance with 85-
2 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
3 its approval or denial of the proposed change. The department shall provide
4 notice and may hold one or more hearings upon any other proposed change if
5 it determines that ~~such~~ a change might adversely affect the rights of other
6 persons.

7 (7) The department or the legislature, if applicable, may approve a change
8 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
9 necessary to satisfy the criteria of this section, including limitations on the time
10 for completion of the change. The department may extend time limits specified
11 in the change approval under the applicable criteria and procedures of 85-2-
12 312(3).

13 (8) If a change is not completed as approved by the department or
14 legislature or if the terms, conditions, restrictions, and limitations of the change
15 approval are not complied with, the department may, after notice and opportunity
16 for hearing, require the appropriator to show cause why the change approval
17 should not be modified or revoked. If the appropriator fails to show sufficient
18 cause, the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the department must be
20 sent to the applicant, and a duplicate must be kept in the office of the
21 department in Helena.

22 (10) A person holding an issued permit or change approval that has not
23 been perfected may change the place of diversion, place of use, purpose of
24 use, or place of storage by filing an application for change pursuant to this
25 section.

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 ~~deemed~~ considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. Leases to enhance or maintain PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES --
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks , WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department , WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for ~~fish, wildlife, or recreation~~ THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must ~~provide~~ INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the ~~lessor~~ LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 ~~(5)(6)~~ The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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1 appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects
2 to his rights that has not been considered previously. IF AN APPROPRIATOR
3 PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF
4 FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN
5 AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF
6 ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
7 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
8 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS
9 SECTION.

10 ~~(6)~~(7) During the term of the original lease, the department, WITH THE
11 CONSENT OF THE BOARD, may modify or revoke the lease authorization if an
12 appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves
13 by ~~substantial credible~~ A PREPONDERANCE OF THE evidence that his water
14 right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS
15 TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
16 SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES
17 THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF
18 PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY
19 FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER
20 LEASES ENTERED INTO UNDER THIS SECTION.

21 ~~(7)~~(8) The priority of appropriation for a lease under this section is the
22 same as the priority of appropriation of the right that is leased.

23 ~~(8)~~(9) Neither a change in appropriation right nor any other authorization is
24 required for the reversion of the appropriation right to the lessor's previous use.

25 ~~(9)~~(10) A person issued a water use permit with a priority of appropriation
26 after the date of filing of an application for a lease authorization under this
27 section may not object to the exercise of the lease according to its terms, the
28 renewal of the lease, or the reversion of the appropriation right to the lessor
29 according to the lessor's previous use.

30 ~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY
31 ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR
32 PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE
33 MEASURING PLAN SUBMITTED UNDER THIS SECTION.

34 NEW SECTION. Section 5. Board designation of eligible stream reaches.

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(1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
WITH THE CONSENT OF THE COMMISSION, may apply to the board for
designation of stream reaches for which water leasing to ~~maintain or enhance~~
PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to
[section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

~~(3)(4)~~ The board may designate no more than 10 stream reaches in the
state where water leasing pursuant to [section 4] may occur.

NEW SECTION. Section 6. Contributions for leasing appropriation rights
OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
contributions from public or private entities for the purpose of:

(A) leasing appropriation rights to maintain or enhance PROVIDE instream
flows for fish, wildlife, or recreation purposes THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
PURPOSES.

(2) Any contributions accepted by the department under this section must be
deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under ~~this section~~
SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
~~enhancing~~ PROVIDING instream flows for fish, wildlife, or recreation UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

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1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-

25

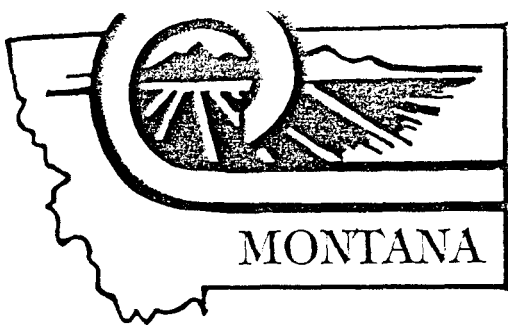


EXHIBIT NO. 10
DATE 3/15/89
BILL NO. HB 707

MONTANA

Association of Conservation Districts

1 South Montana 443-5711
Helena, MT 59601
March 15, 1989

Testimony to the Senate Agriculture Committee on HB 707.

For the Record, my name is Peggy Haaglund and I am executive vice president of the Montana Association of Conservation Districts.

MACD does support HB 707.

MACD has a resolution that supports voluntary leasing to the Montana Department of Fish, Wildlife and Parks of offstream water rights for instream flows as long as current water rights are not adversely affected and the volume of water leased is not greater than the original depletion.

MACD will only consider supporting the sale of offstream water rights for instream flow after more careful study has been done that shows that there are no significant adverse effects on adjacent users or local economies.

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1988 Resolution No. 37

WHEREAS, in some cases streams are dewatered in low flow years to the detriment of instream values; and

WHEREAS, MACD prefers storage built by investment of both instream and offstream users as a long term answer to Montana's water supply; but

WHEREAS, in the meantime contractual leasing arrangements may be possible that serve the interests of both instream and offstream users;

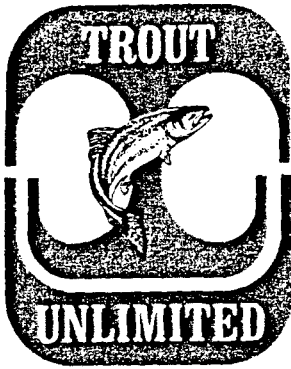
THEREFORE BE IT RESOLVED, that MACD supports voluntary leasing to the Montana Department of Fish, Wildlife and Parks of offstream water rights for instream flows as long as current water rights are not adversely affected and the volume of the water leased is not greater than the original depletion.

BE IT FURTHER RESOLVED, that MACD will only consider supporting the sale of offstream water rights for instream flow after more careful study has been done that shows that there are no significant adverse effects on adjacent users or local economies.

Submitted By: Water Resources Committee

COMMITTEE ASSIGNMENT: Water Resources

Lorents Grosfield made a motion for adoption of the resolution. The motion carried.



SENATE AGRICULTURE

EXHIBIT NO. 11

DATE 3/15/89

BILL NO. HB 707

WEST SLOPE CHAPTER

P.O. Box 7316

Missoula, Montana 59807

March 15, 1989

To: Senate Agricultural Committee

From: Robert J. Whalen, Jr.

West Slope Chapter

Trout Unlimited

Subject: House Bill 707

The two hundred and fifty members of the West Slope Chapter of Trout Unlimited urge you to support H.B. 707 without additional amendments. This bill is designed to protect fisheries in times of drought and provide direct benefits to those lessors willing to lease water to the Department of Fish Wildlife and Parks.

Montana has the nationwide reputation of providing the best trout fishing in the nation, and probably in the world. That status is threatened by the over appropriations of water in the states streams and rivers. The water law in it's present form discriminates against in-stream water users. These are the only users not provided the opportunity to lease water rights from agreeable rights holders.

This law is vital to our state so that we can maximize the productivity of our streams for the enjoyment of Montana's citizens and to attract out of state fishermen.

SURFACE AND GROUNDWATER REQUIREMENTS: - Bitterroot Valley

The perennial need for more surface (diversionary) water for crop irrigation and aquifer recharge is now coupled with increasing demands for instream flow to satisfy increasing recreational demands in all of Region I. The scarcity of any water at all in late July, August, and often in September, in most tributaries of the Bitterroot drainage costs Ravalli County and the State ^{many m} billions of dollars. The Montana tourist and recreational guide urges tourists to come to western Montana to revel in the water-oriented pursuits at the very time, when the entire watershed is drying up (Appendices 4, 5, 7, 8, 9 & 11)

Clearly needs for late summer water transcends the taxpayer subsidized roading and clearcutting proposed by the BNF. Tourism and recreation infuse the economy with many millions of dollars. The BNF 50-year plan is a program to systematically abort all activities relating to tourism, recreation, ^{farming} and related amenities.

Our water needs may be clarified by a brief analysis of the water budget of the Bitterroot and other parts of Region I. Note Figure 10A that our annual precipitation in Ravalli County average is about 5,600,000 acre feet of water, over 90 percent of which

(Table 2)

falls within the mountainous areas of the BNF. Of this total, about 3 to 3.5 million acre feet are evapotranspired into the air. This evaporated water seeds clouds that produce additional rain and snow in the Bitterroot and downwind to the east in central and eastern Montana. The evapotranspiration from plants and the evaporation of water from lakes and streams serve to reduce extremes in temperature during both summer and winter. The climatic effect of this water is highly beneficial.

The remaining 2 to 2.5 million acre feet of water constitutes runoff into the Bitterroot Valley. Some 50 to 65 percent of this runoff occurs during peak flow during May, June, and early July. It is important to examine what happens to this water.

(1) Over 100,000 acres of land under cultivation in the valley require irrigation (Figure 8, 11)

(2) Approximately 6,000 wells draw an average of 2 to 3 acre feet each per year.

(3) There are about ^{750,000 to} 1,000,000 recreations users seeking Bitterroot streams for aquatic sports and amenities.

Yet in 1985 and 1987, all of the tributaries to the Bitterroot River except the East and West Forks were dewatered by primary users, usually first and second decreed water rights by August 15, (Figure 8, 11).

Between August 15 and October 15, 87, the only water available

in the valley was derived from the Bitterroot River which draws
→ on Painted Rocks reservoir. All other decreed water rights could
not be met. This means that ~~almost~~^{over} three-fourths of
Bitterroot inhabitants with decreed water rights had no water.
A secondary effect of this diversionary water shortage was lack of
aquifer recharge from leaky irrigation ditches that were dry.
Aquifers were mined and approximately 375 wells went dry Appendix 5

These two years were not unique. Acute water shortages in
late summer occur in 3 out of every 5 years. The costs of these
annual water shortages are difficult to evaluate in dollars, but
are clearly in the tens of millions of dollars. The economy of
the region, due to water shortages, involves abandoned farms, lost
farm income, lost income from tourism and recreation, dry domestic
and business wells, and lost income to service industries at the
height of the tourist and recreational season (Appendices 4, 5, 7 & 8)

The water needs may be best understood by separation of
diversionary water from instream flow to support the aquatic biota
especially trout.

DIVERSIONARY WATER:-

The 100,000 acres of farm land requiring irrigation from crops
and pasture, plus aquifer recharge from leaky ditches require
approximately 600,000 acre feet of water per average year. Of
this 2 to 2.5 acre feet of water per acre are required for crop

growth and aquifer recharge in the period July 15 to Sept 15. Approximately 80 percent of this water is diverted by a complex system of irrigation ditches which total over 450 miles in length. Our research over the last decade indicates these ditches lose an average of 25 percent of their water per mile by sinkage into the ground (which recharges aquifers) and by evaporation and evapotranspiration. More than half the fields irrigated are from one-half mile to one and one-half miles from the source of ditch intake *(see Appendix 9, Figures 8 & 11.*

Although some marginal farms are being subdivided, demand for diversionary water continues to increase. This is true for two reasons (1) land not previously farmed especially in the foothills is being subdivided into ranchettes of two to forty acres. These ranchettes are variously grazed by horses, planted in lawns, orchards, gardens and dotted with ponds, (2) needs for groundwater derived from ditch and field loss of diversionary water continue to increase and both domestic and irrigation wells are drilled into the unconfined aquifers. Amounts of groundwater needed to supply the growing number of wells ^{cannot} depend largely on rainfall which is rarely over 1.5 inches in July and August *(Appendix 9, Table 2*

No matter how the shortage of diversionary water for surficial crops and other uses is calculated, it exceeds 150,000 acre feet in late July, August, and September. There are now, approximately, 6,600 wells pumping groundwater from aquifers in the Bitterroot Valley and foothills. The dynamics of a typical aquifer in the

Big Creek area are discussed in Appendix 9, attached.

INSTREAM FLOW:-

The current condition of dewatered streams in late summer and early fall must be mitigated if the Bitterroot Valley is to achieve economic vitality. In the face of currently dry streams there are exploding demands for additional fisheries and aquatic recreation with the peak of recreational demands correlating with the dewatering of streams (see Appendices 5, 7, 8)

To keep each of the major tributaries as viable recreational sites and fisheries requires a minimum instream flow of at least 500 acre feet per stream, per week, in mid- to late-summer and early fall. This is in excess of the water needed for diversion.

The solution of Bitterroot water needs in late summer includes: (1) minimum further logging and roading of the watersheds, (2) extensive soil and slope rehabilitation including terracing by hand, not machine, (3) aggressive replanting with drought resistant species of trees, (4) reservoirs on at least twelve of the major tributaries of the Bitterroot River with holding capacities of at least 8,000 acre feet of water.

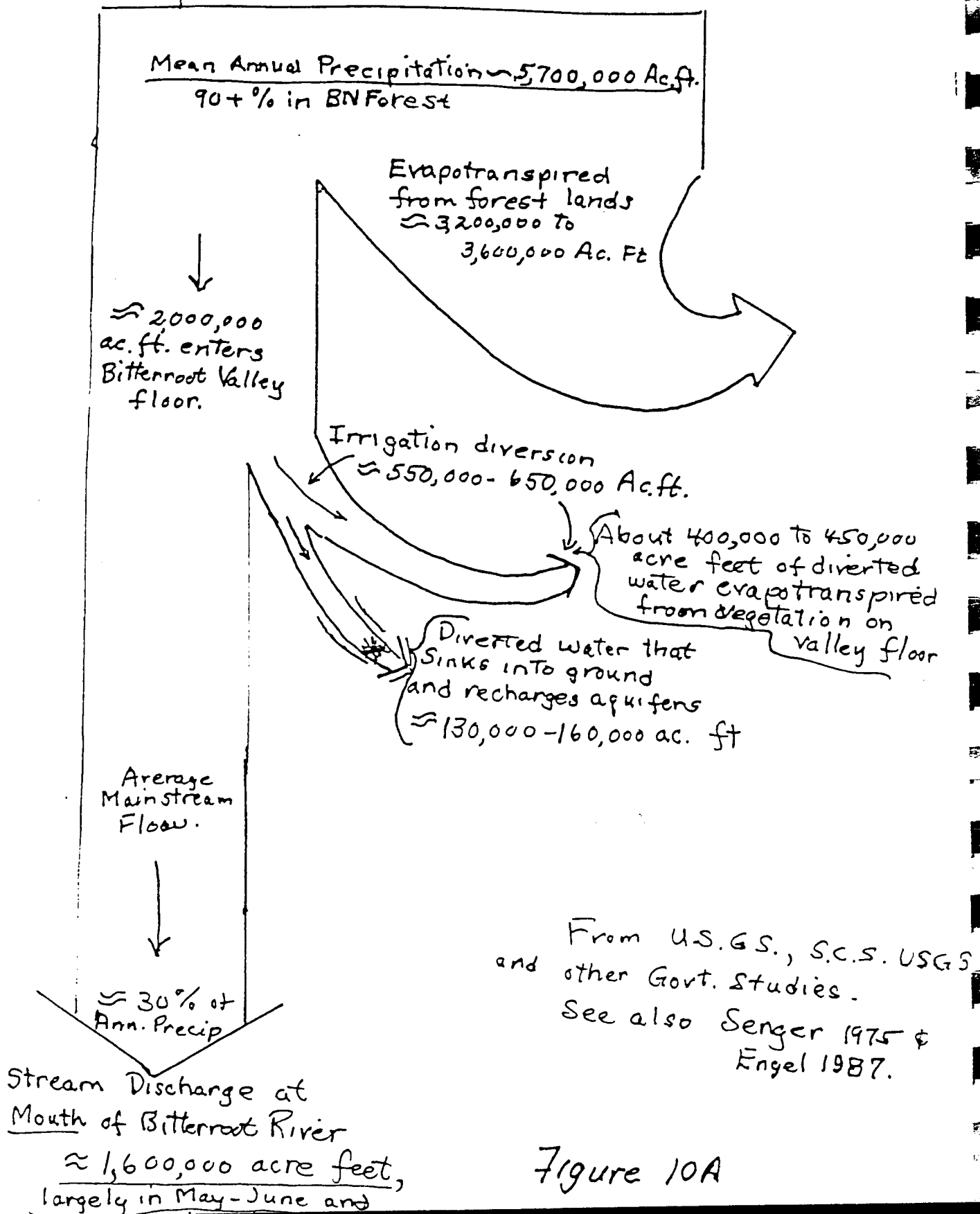
In addition, one or two reservoirs of the size of Lake Como.

The economics of this program involve a transfer of the five

Water Budget
Bitterroot River Drainage
based upon 'Average' precipitation data.
Amounts decrease greatly in dry years.

Figure 10A

EXHIBIT # 12
3/15/89 HB 707



Generalized curves of stream flow from National Forests of Ravalli County during "normal" and "dry" years. Skewed patterns of flow, and abortion of late summer flow and aquifer recharge are shown below.

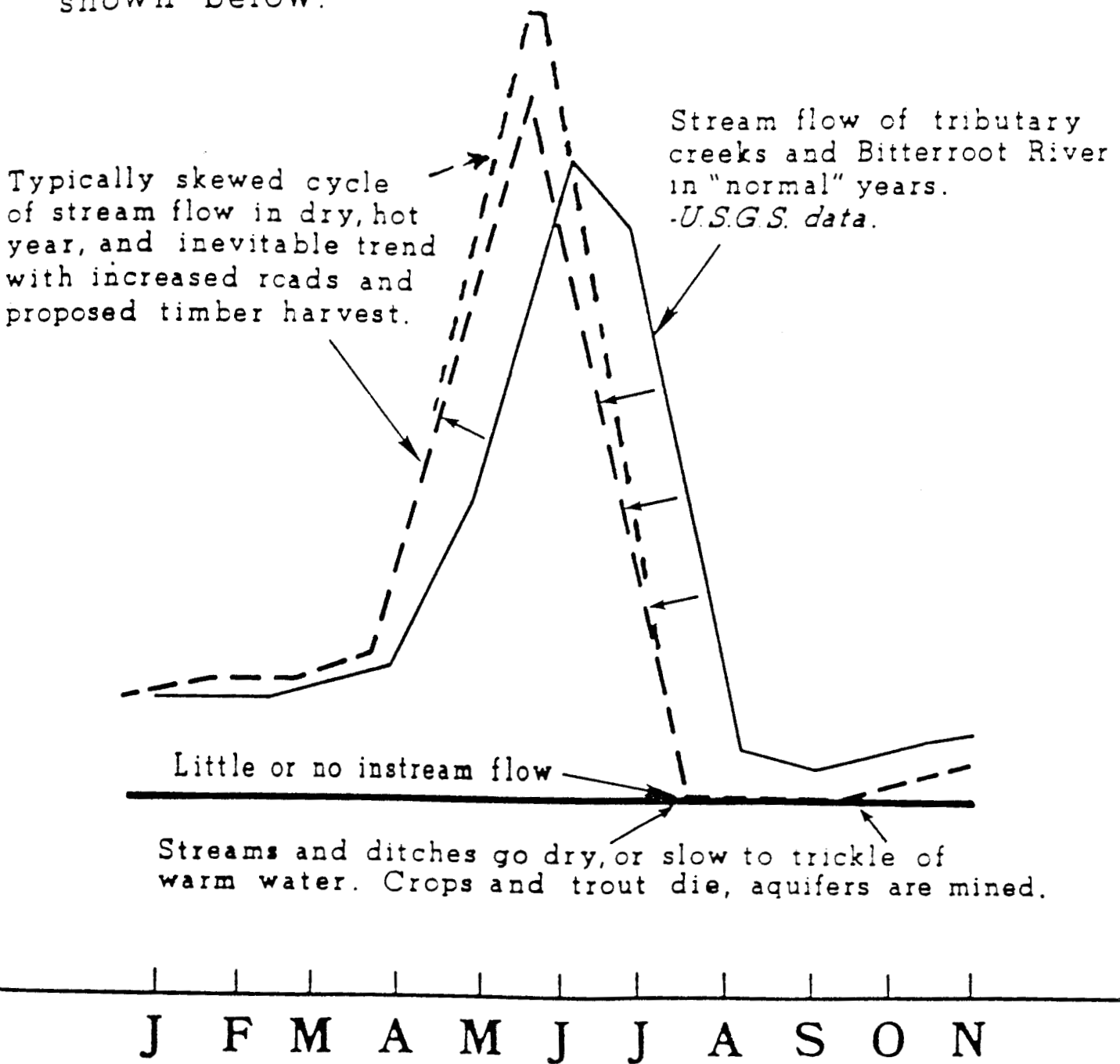
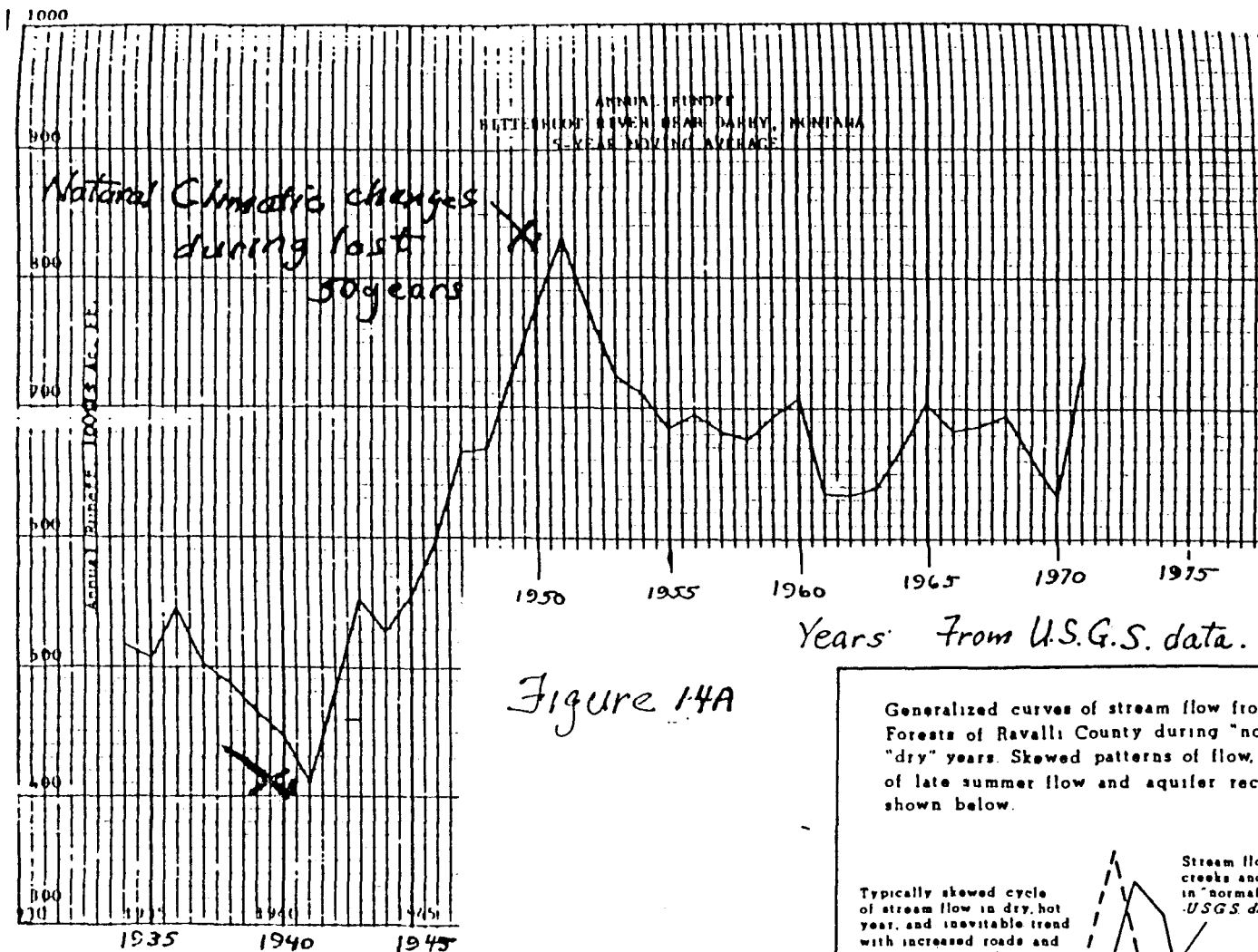
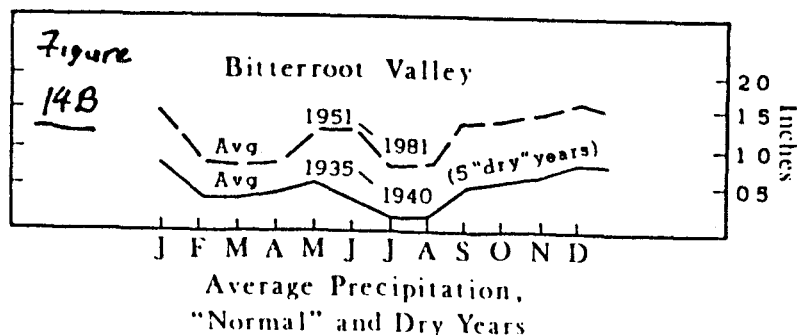


Figure 1



From U.S.G.S. data.

Figure 14A



Generalized curves of stream flow from National Forests of Ravalli County during "normal" and "dry" years. Skewed patterns of flow, and abortion of late summer flow and aquifer recharge are shown below.

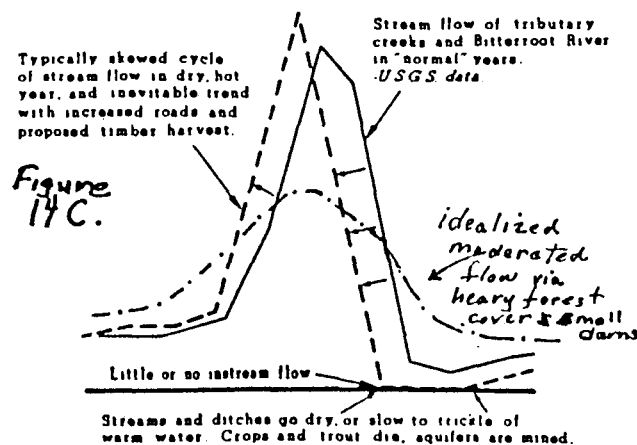
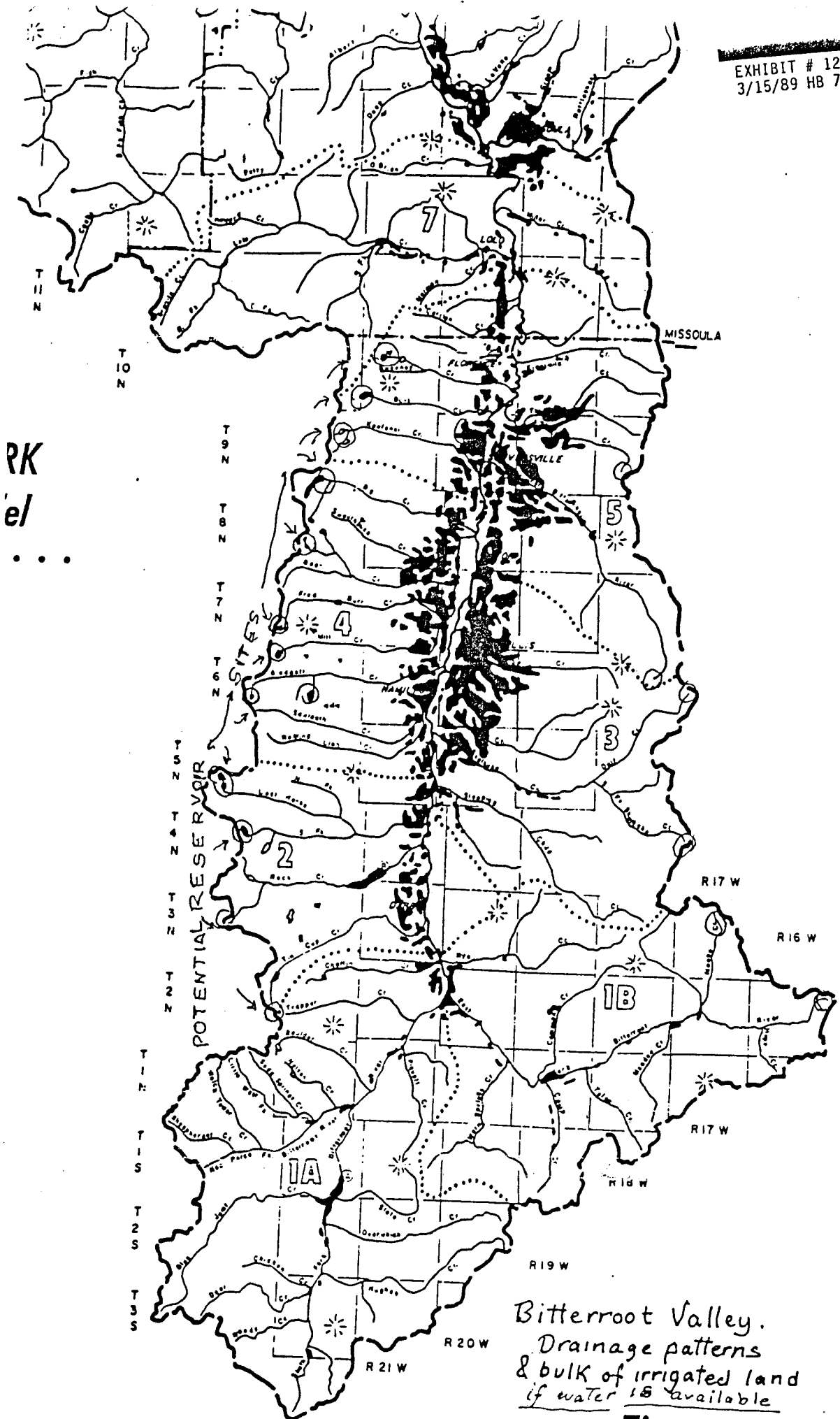


Figure 14C.



RK
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Bitterroot Valley.
Drainage patterns
& bulk of irrigated land
if water is available

Fig 12

Rge. 20 WEST

LEGEND

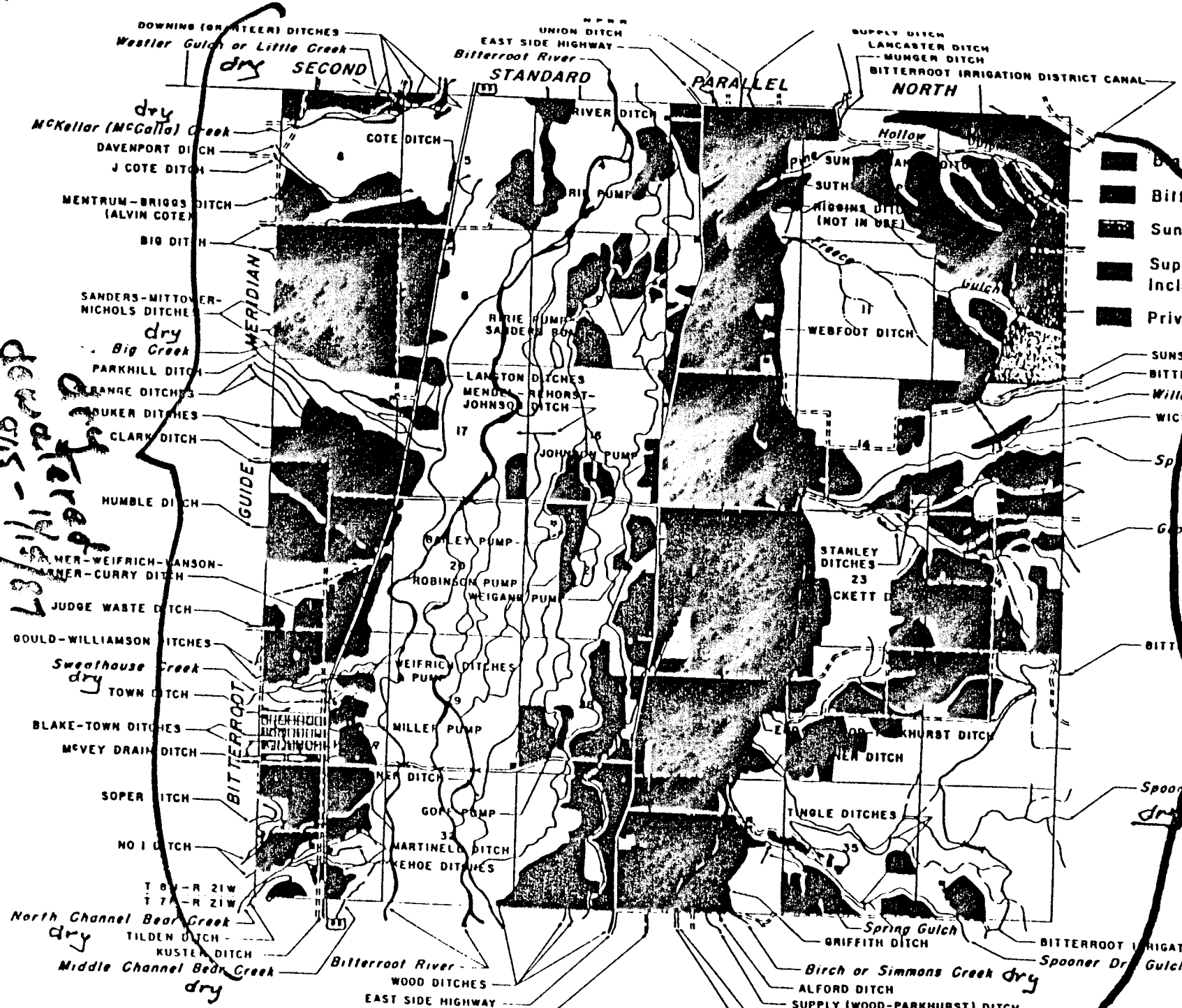
- Big Creek Lakes Res. Ass'n
- Bitterroot Irrigation District
- Sunset Irrigation District
- Supply Ditch Association Including Wood-Parkhurst
- Private Irrigation

- SUNSET HIGHLINE DITCH
- BITTERROOT IRRIGATION DISTRICT CANAL
- Willoghby Creek dry
- WICHAM GRAVITY SPRINKLER SYSTEM

- Spring Creek dry
- Goose Neck Branch dry

8/15/87 - 10/15/87
All decreed
rights except
1st & 2nd
lacked water
water table 10' below
normal

decree
8/15-10/15/87



Ph.D., D.Sc.
Hydrology & Geology

THE HYDRODYNAMICS OF A SIMPLE BITTERROOT AQUIFER

Big Creek Aquifer

The attached figures and maps are interrelated and fundamental to an understanding of groundwater behavior in many Bitterroot aquifers. The Big Creek aquifer is typical of aquifers which occur throughout the alluvial blanket in the Bitterroot Valley.

Figure 7 shows the location of the Big Creek aquifer, and Figure 8 is a map of the aquifer which is bordered on the west by the Heartbreak Hills (Figure 7). The line A-B is the location of a vertical section through the aquifer as indicated by the detailed studies of well logs and field mapping (Figure 9). Because the Big Creek floodplain is relatively narrow in this area, it is not differentiated from the blanket of sands, gravels, and clay lenses that define the broad areas between this and adjacent creeks.

Seventy eight wells have been drilled in the aquifer, and more are in progress. All of the seventy eight wells are being actively pumped at rates ranging from 0.3 to 18 acre feet per year. This high withdrawal is because most of these wells are multipurpose, for house, garden, yard, and meadow. Six of the seventy eight wells are used solely for irrigation of horse pasture, gardens and trees. These wells yield from 10 to 40 acre feet weekly from late May through September. This means that from May through September about 200 to 300 acre feet of water is pumped from the Big Creek Aquifer (BCA). One acre foot of water contains 325,900 gallons.

During winter months, groundwater consumption in the BCA averages about 45 acre feet per year. Presently, several farms are partly subdivided, but wells have not been drilled on the lots. In the future decade, or two, at least 50, perhaps 100 wells, will be drilled into the aquifer withdrawing another 50 to 200 acre feet of water. Thus, we may project the yearly withdrawal rates of about 400 acre feet of groundwater from the BCA by the year 2000.

Most wells are drilled to depths of 30 to 60 feet, and yields range from 10 to 50 gallons per minute, with the average yield about 25 gallons per minute when the wells are not pumped dry.

The history of groundwater use from the BCA in the last thirty years is critical in understanding problems currently encountered in water use, and indicates serious water problems in the future.

In 1960, there were only twenty one active wells in the BCA. Eleven of these wells were hand dug to depths of 12 to 18 feet. Water use from these wells was largely for the farm house, and totaled no more than 0.3 acre feet per year. Some wells went dry and water was carried from the nearest ditch or stream until spring. Half of the farms had no bathrooms, or other modern water-consuming appliances. Gardens and fields were supplied by

open irrigation ditches and sheet flooding.

In 1960, about eighty five percent of the land in the BCA, from highway 93 on the east, to the westerly limits of the aquifer, was farmed using sheet flooding. An average of about 4.5 to 6.5 acre feet of water per summer was spread over the surface of the unconfined aquifer for irrigation of crops. From fifty to seventy percent of the irrigation water was evaporated, or evapo-transpired, by plants. About twenty to thirty percent of the water from the ditches and fields sank into the aquifer, recharging it each year. The groundwater table from June through August, in an average year, was never deeper than twenty feet. Throughout the stippled east half of the aquifer, the groundwater table is never lower than four to five feet below the surface, and in several areas, less than two feet from the surface, a condition true in most recent years. (See Figures 9, 10, and 11).

Between 1960 and 1986 groundwater consumption from wells and sumps in the BCA increased from four or five acre feet per year to over 250 acre feet per average year. By the year 2000, groundwater withdrawal will increase to about 450 to 500 acre feet per year. This represents an increase of almost one hundred times as much groundwater demand from the BCA, then in 1960.

In addition to recharge of the BCA from sheet flooding at the rate 1 to 2 acre feet per acre, the leaky irrigation ditches lose some 20 to 50 percent of the water carried per mile, and add at least another 75 to 100 acre feet of water recharge into the BCA with the amount depending on land use and weather (See Figure 9).

Consequently, recharge in 1960 amounted to 1.5 acre foot per acre via irrigation from mid-May through September, if instream flow in Big Creek was available to the ditches. During the same period, rainfall contributed no more than 0.3 acre feet per acre. Big Creek instream flow in late summer is augmented by 2,600 acre feet of water impounded in Big Creek Lakes during spring melt. This water is released in two to three intervals beginning in August. In recent years all impounded water is released by August 15, and Big Creek runs dry on most of the private lands.

The data above, and accompanying figures, indicate the fact that irrigation via leaky ditches and sheet flooding, is by far the major means of recharging the BCA, contributing about 75 percent of yearly aquifer recharge. Similar relations pertain in most of the aquifers in the alluvial blanket that forms the Bitterroot Valley floor.

In wet summers instream flow continues throughout late August and early September, but in hot dry years Big Creek runs only a trickle during late July, August, and September. There is no available water for irrigation of crops or for aquifer recharge.

Other Bitterroot creeks lacking a major source of impounded

recharge. Without the major contribution to the groundwater table from leaky ditches and sheet-flooded fields, most or all of the westerly half of the BCA would be mined of its water within two years. We see very clearly, the inception of mining of water from aquifers in the Bitterroot Valley during the period 1980 to 1988.

The demise of the family farm, the increasing subdivisions, more wells, and the eventual decline in leaky ditch repair and use, poses a groundwater threat of major proportions in the Bitterroot Valley. The problem will be highlighted in the future because it is the western, and eastern portions of the aquifers that are especially enticing to new home owners because of their view, seclusion, and charm.

The quantification of these problems and the spector of dry wells and disheartened, dissolusioned homebuilders, farmers, and recreationists, is the main thrust of our research.

The data illustrated by Figures 7 through 11, indicate we must (1) impound large volumes of water from spring snowmelt in new reservoirs, and increase thereby instream flow and aquifer recharge throughout the summer, fall, and winter, or (2) pay the billions of dollars necessary for valley-wide irrigation systems. Proliferation of wells in the valley floor can't be continued without developing sources of recharge.

A. Engel
2/5/89

water, commonly run dry by the end of July and water users must resort to either pumping of groundwater or allow the meadows and crops to dry up.

The amount of groundwater recharged into the BCA each year (1.5 to 2.5 acre feet per acre) from irrigation water approaches current needs. But many of the farms are being subdivided, fewer ditches are maintained, and areas of sheet flooding decrease. Because of the permeability of the BCA, groundwater flows downslope toward the river at rates ranging from 200 feet in twenty four hours in its westerly parts, to several feet, or less, near the river. This is because the aquifer slopes from 80 to 100 feet per mile and the water pumped downslope from increasing numbers of wells, dewater the western edge of the aquifer.

As a result, by mid-winter (1984 to 1988), the most westerly part of the BCA is drained dry, and so are the eight to ten wells in the westerly area. These wells can't be deepened because there are no deeper aquifers, and no groundwater between them and China.

These fluctuations in the groundwater table in the sloping aquifers of the Bitterroot Valley floor are indicated in Figures 9 and 10.

Note in Figure 10 that in the west one-fourth of the BCA, the water table is some two to four feet below the surface one month after sheet flooding of the fields begins to recharge the western part of the aquifer (late May). But by December and January, the western margins of the aquifer, may be dry or nearly dry, whereas the eastern parts of the water table, along and just west of Highway 93 (the downslope side of the aquifer) rarely fluctuates more than six feet below the surface even in the winter, and early spring.

These data on water table recharge and fluctuations in the BCA, coupled with plots of precipitation and annual sheet flooding are summarized in Figure 11, derived from measurements within the BCA over the last 15 years.

Note in Figure 11, the extreme annual fluctuations in water table in the BCA along its western parts (see also Figure 9). Note that the rate of easterly flow of the groundwater, which we measure 6 to 8 times per year, and the decrease in groundwater flow in the eastern, downslope parts of the aquifer, where very small fluctuations exist in the groundwater table. Note also the upper two graphs, Figure 11, showing amounts of annual rainfall, and the period and amounts of sheet flooding.

It is clear that the maximum rise of the groundwater table coincides with the driest months of the year, and correlates exactly with periods of maximum sheet flooding (upper diagram, Figure 11). Clearly, the annual precipitation in the valley, over the BCA, and other aquifers has minimal influence on aquifer

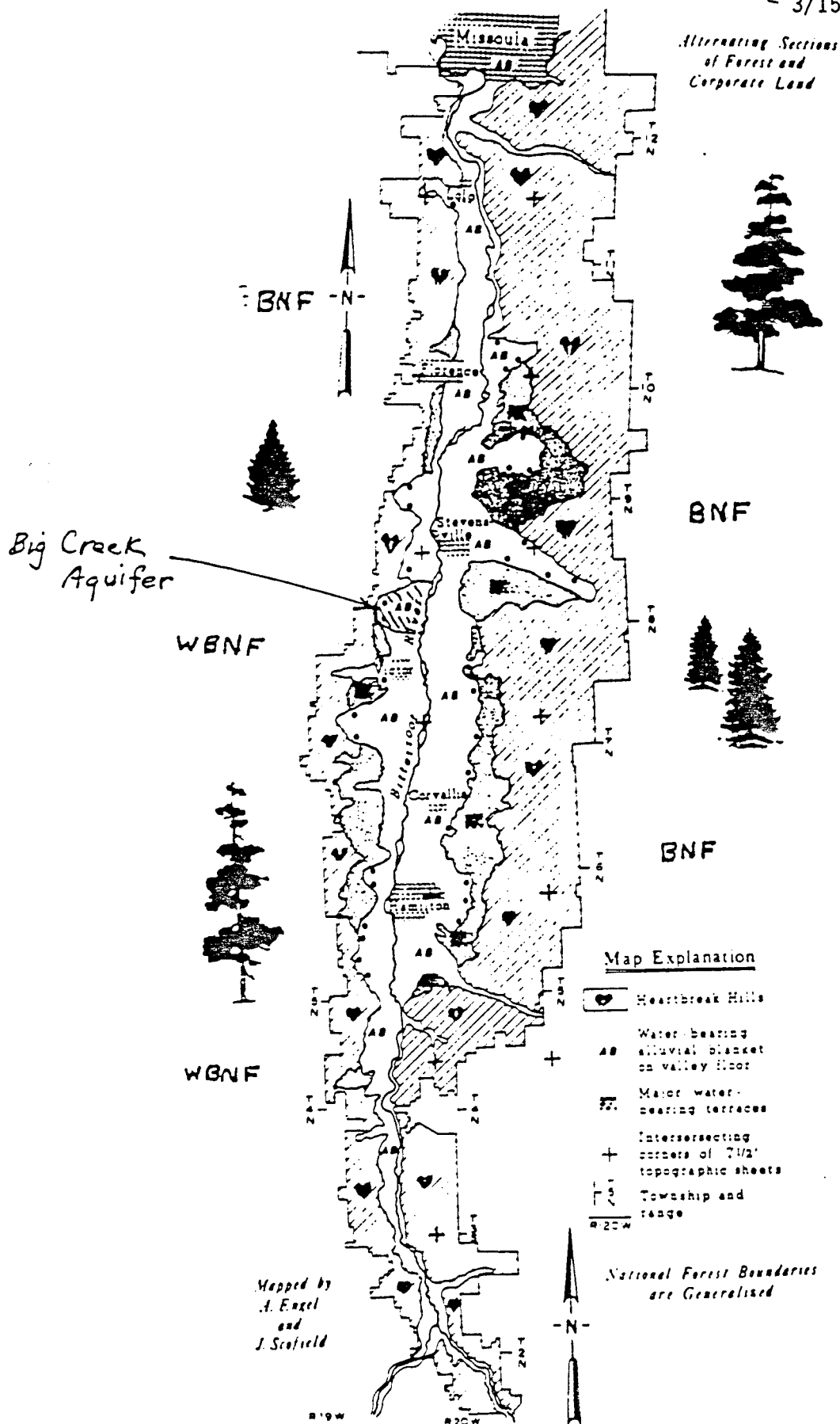


Figure 7.

BIG CREEK DRAINAGE & DITCHES

Map and data
A. Engel

EXPLANATION



Heartbreak Hills

ID

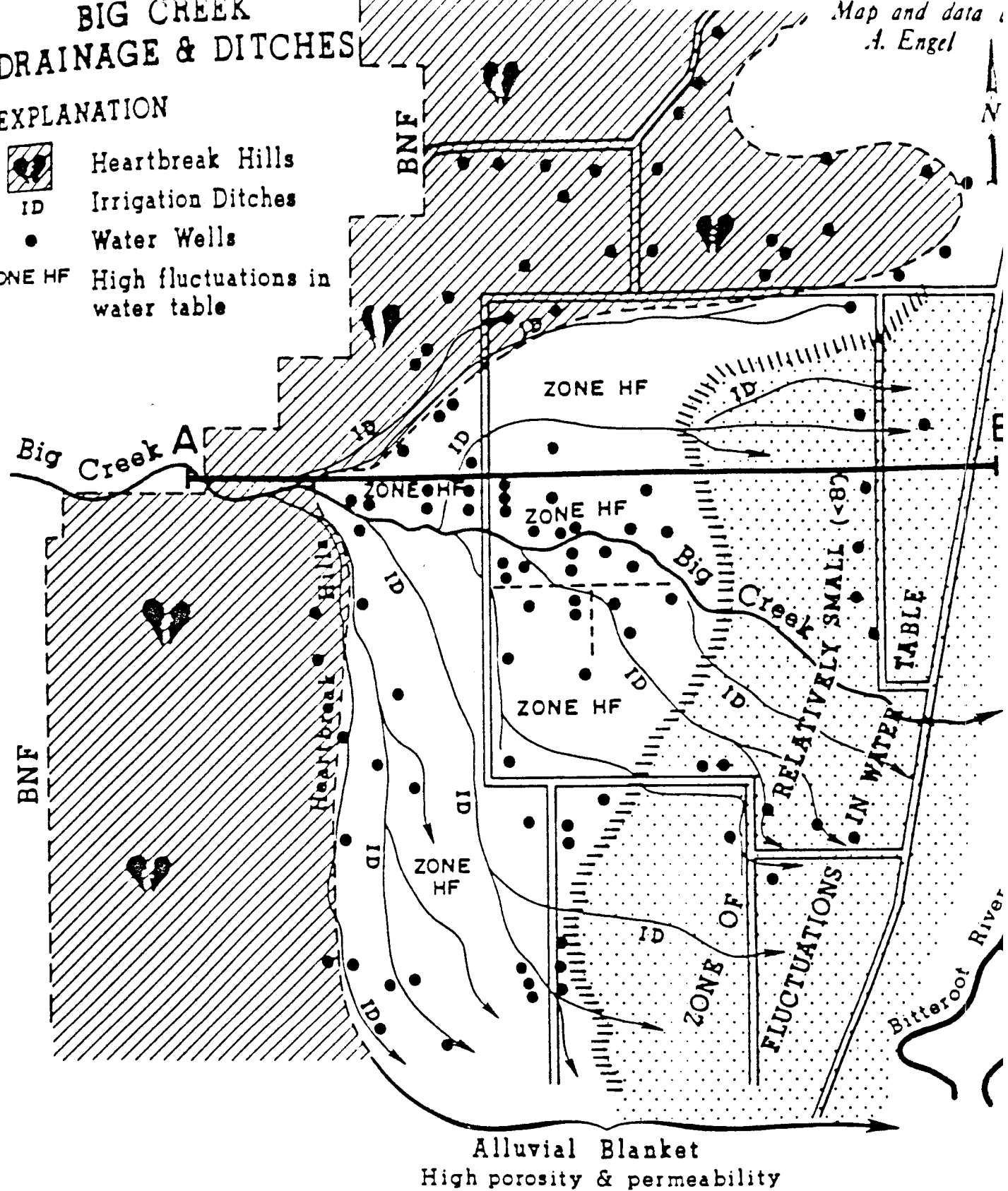
Irrigation Ditches



Water Wells

ZONE HF

High fluctuations in
water table



Alluvial Blanket
High porosity & permeability

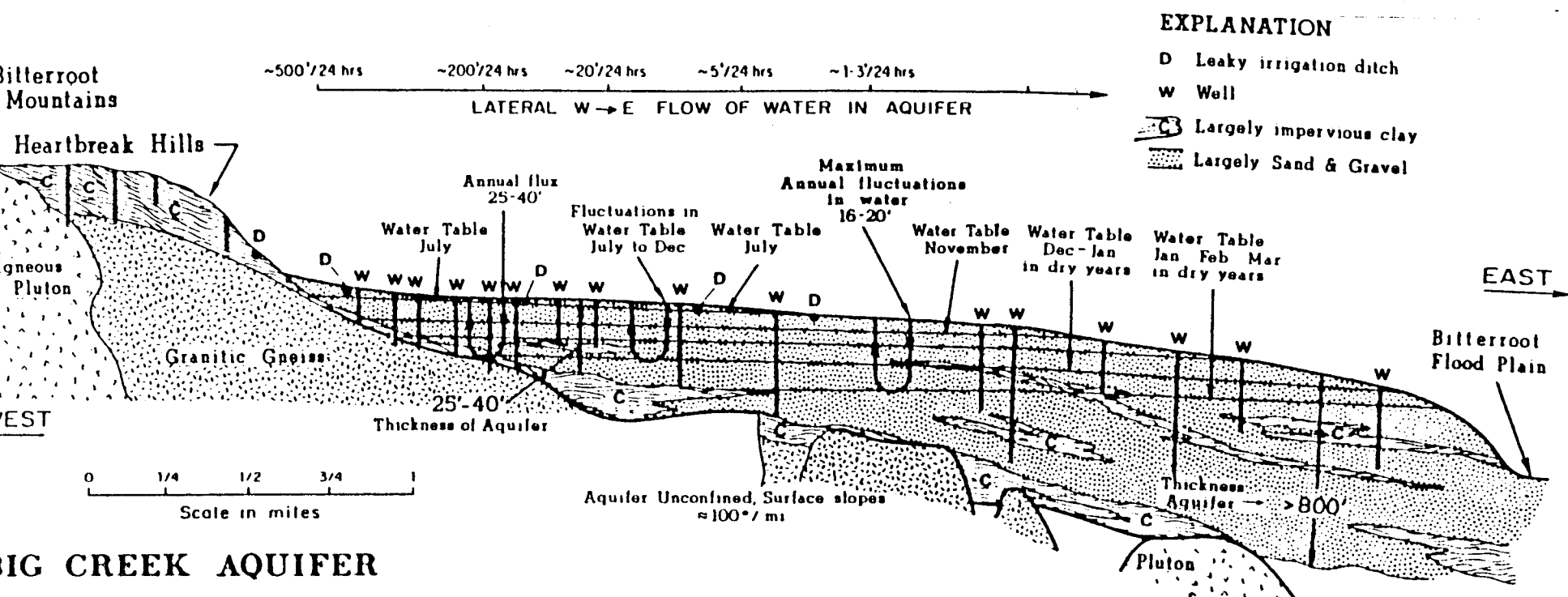
Map of Big Creek Aquifer
typical of alluvial aquifers on 'west side'

Figure 8

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Figure 9.

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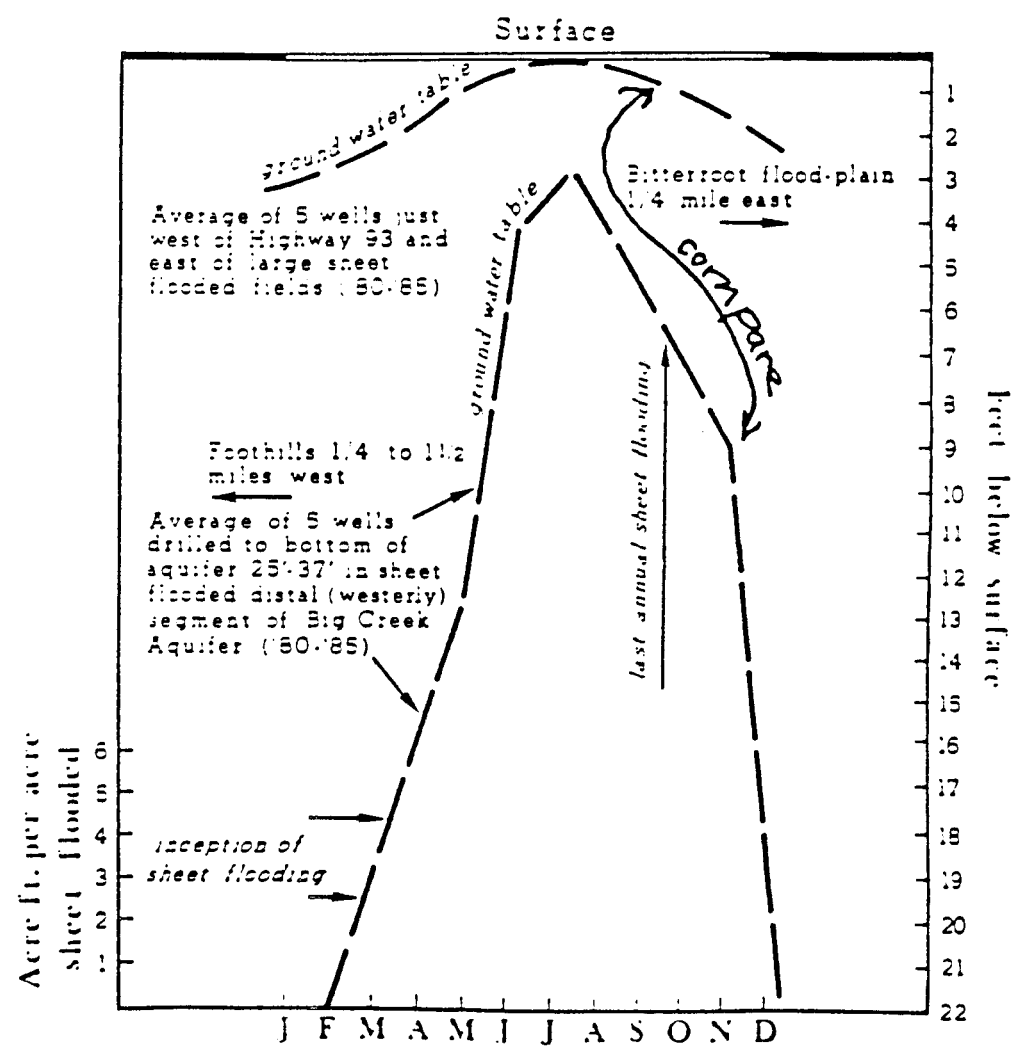
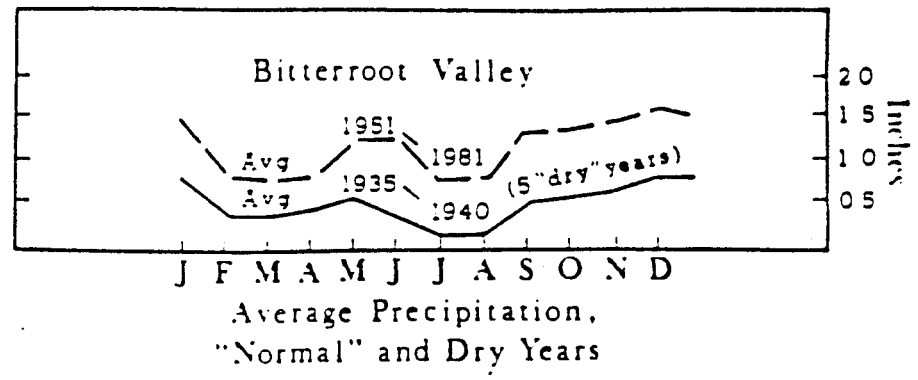
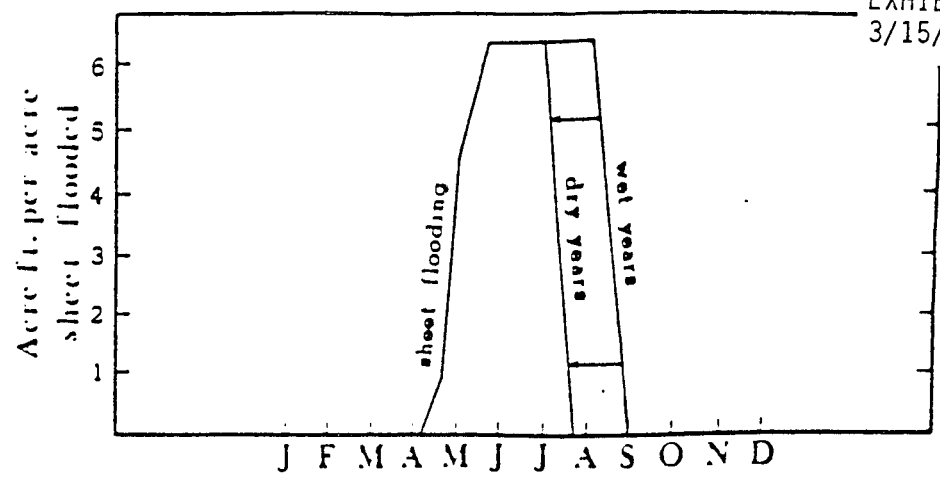
BIG CREEK AQUIFER

Figure 9.

Note that pumping in new wells in the eastern (down slope) → part of the aquifer dries up the aquifer in its western part. This trend will increase greatly as new wells compete for a constant or decreasing annual recharge.

True throughout Bitterroot Valley.

Figure



Fluctuations in ground water table below surface, Big Creek Aquifer.

Figure 11

EXHIBIT # 12
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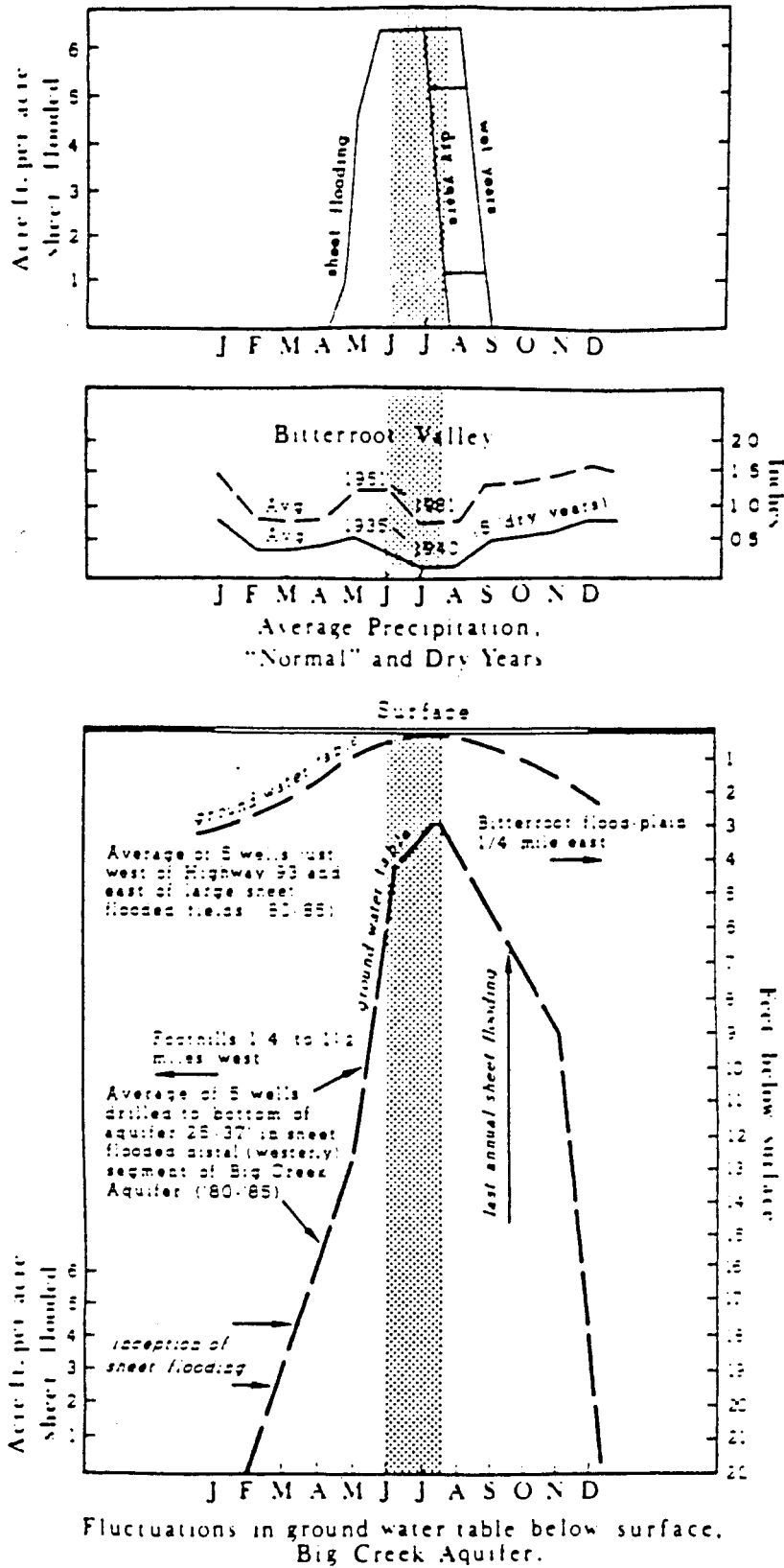


Figure 11 Interrelations between recharge of the BCR, sheet flooding & valley rainfall. Note the aquifer is recharged in the driest

SENATE HEARING - HOUSE BILL 707
March 15, 1989 - Old Court Chambers

Carl M. Davis Testimony

MR. CHAIRMAN - MEMBERS OF THE COMMITTEE

My name is Carl M. Davis - I am an attorney practicing law in Dillon, Montana, for the past 40 years, and my only recreation is fishing, hunting and river boating.

I am testifying today in behalf of the Ruby River Water Users Association whose 78 water users irrigate approximately 35,000 acres in Madison County, Montana, from waters of the Ruby River and its tributaries and from storage in the Ruby Dam. I am also testifying on behalf of the Water Users Irrigation Company with 30 water users irrigating approximately 18,000 acres from the Red Rock and Beaverhead Rivers and storage from the Lima Dam which they own and operate, and on behalf of the Clark Canyon Water Supply Company and East Bench Irrigation District with approximately 200 water users irrigating over 50,000 acres in Beaverhead and Madison Counties from the Beaverhead River and storage in the Clark Canyon Dam.

All of the above adamantly oppose HB-707 on the following grounds:

1. Water leasing by the Department of Fish, Wildlife & Parks is not the answer to solve minimum instream flows.

2. The bill as written is really to conduct a very costly experiment and will not accomplish its intended purpose. It will create another administrative nightmare for the State and the water users.

3. The bill would violate our existing water law which has always provided that water rights only give a person the right to use water in such amount as is needed and can be beneficially used on the lands for which the water is appropriated. Our courts have consistently held:

"When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator or appropriators give way to his superior claim."
Cook et al. v. Hudson, 110 Mont. 263.

If the water right is not needed or beneficially used the next right is entitled to the water and that right is protected by Montana's constitution which ratified and confirmed existing rights. Article IX, Sec. 3. I served with Senator John Anderson in the Constitutional Convention and know his knowledge and experience on water matters merit consideration by your Committee.

4. We believe HB-707 gets the cart ahead of the horse and that the time and money it will entail could be spent more wisely by the Department identifying the problem areas and attempting to resolve the minimum stream flow problems by working with the water users, sportsmen and other parties concerned and knowledgeable in this area.

This would also allow time for the Water Courts to complete the adjudication process that will determine the water rights in Montana.

This can be done.

The founders of the Ruby River Water Users experienced the devastating effect of the drought of the 1930's and as a result of their efforts and the foresight of the State of Montana, the Ruby Dam was constructed in 1937. With the storage the Association has been able to provide a minimum instream flow during critical low flow periods since 1937, except for a couple of days during 1985 and 1987 when there was a short section of the River that was briefly dry. This provoked an outcry from fishermen and was highly publicized. The downstream water users of course were also suffering from the shortage and the Association and water users made every effort to and did resolve the problem. The Association now makes daily readings of the river at 5 critical points during low water and maintained

adequate water in the river during last summer, the driest year on record, for fish and wildlife. I don't know whether it was or when it is adequate for recreation or who will eventually define that term in the Bill.

The Ruby River water users, in cooperation with the Fish & Wildlife Dept., believe they have resolved the instream flow problems in the Ruby River area where all interests are satisfied.

The Clark Canyon Dam was constructed on the Beaverhead River through the efforts of the old timers who had survived many low water years, despite opposition from the then Fish & Game Department and many sportsmen - who historically oppose dams and storage projects. By agreement and in cooperation with the Fish & Wildlife Department we maintain a minimum instream flow in critical low flow periods sufficient to protect the fish and wildlife, and since the Dam was completed in 1965 the Beaverhead River and Clark Canyon Dam have been a mecca for fishermen and a bonanza in license sales for the Department.

The Lima Dam has historically provided water to maintain the Red Rock River until the drought of 1988 when the upper reaches of the River ceased to flow without any diversions for irrigation. This Bill wouldn't have solved that problem as there was no water to lease.

We have many objections to the language of the bill but are equally concerned with what is not included in the bill. The language in the Statement of Intent in the bill provides "that the Legislature encourages the Board to select stream reaches where leasing has a good chance of succeeding and where all interests may be satisfied."

"The legislature also intends that the review process for lease applications be thorough and provide ample opportunity for consideration and input by concerned persons. As required in (section 4), the process should involve notice and opportunity for objections and hearing in the same manner provided for proposed changes in appropriation rights. The legislature

contemplates that the department of fish, wildlife, and parks will meet with appropriators along each designated stream reach to assess and consider any concerns before filing applications for lease authorizations."

If this is what the legislature intended, it certainly isn't what the bill says.

Section 4, part 4, of the bill is an example of the complexities of our water use that needs clarification. The Act reads:

"The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, of THE AMOUNT LEASED, only the amount historically consumed by the lessor, or a smaller amount if specified by the department in the lease authorization, may be used to enhance or maintain streamflows below the lessor's point of diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS."

The normal irrigation practice is to divert and use a good deal more water than the appropriated right when water is available, and only after the water flows recede is the water user limited to his water right. The leased amount should be limited to the amount of the water right or the amount historically diverted by the Lessor, whichever is the smaller, and of the amount leased only the amount historically consumed.

The Act provides - Sec. 4(10) - "The Department shall pay all costs of providing personnel to measure streamflows." This Act should provide that "only water commissioners appointed by the District Court shall have authority on the streams"

The costs to the Department of installing measuring devices in many areas could well exceed the budget.

New section 4(2) requires the completed application to meet the requirements of Sec. 85-2-402.

Sec. 85-2-402 permits a change in use only if the proposed use will not adversely effect the water rights of other persons.

But it is up to any appropriators adversely affected by a lease to prove by substantial credible evidence that his right is

-4-

This is the same as no redress at all for a water user during critical low flows with the very livelihood of the water user at risk because by the time you can get the issue resolved through the administrative procedures involved and the court, the drought would be over and the farmer broke.

The 10 year lease period is too long to experiment with a law that acknowledgably only has a chance of succeeding.

We submit that leasing will adversely affect other appropriators by diminishing return flows or depriving other appropriators of their legal rights.

House Bill-707 would fly in the face of and seek to undermine what has been established water law in the State of Montana since the first reported water case was heard by our territorial Supreme Court in Virginia City in 1869.

That law, simply stated, is this:

Once the senior appropriator of water from a stream has used the amount of water to which he is entitled by Court decree, for the acreage to which it was decreed, he must return the surplus to the stream - so that the surplus in turn - may be enjoyed by the next appropriator or appropriators.

House Bill-707 would permit this senior appropriator, if the price is right, to lease his water to the Department of Fish, Wildlife and Parks, for obviously recreational purposes, and take the water far beyond the reach of the junior appropriator whose very livelihood may depend on such water.

Mr. Chairman, and Members of the Committee, this is not the year to initiate a new and costly program to enhance recreation with funding so difficult for education and other essential existing programs. Our rivers and streams are being prudently managed, fishing is great, and the system is working despite the drought. Wouldn't it make sense to devote our time and money toward the completion of the water rights adjudication process we are involved in now before starting another water program.

-5-

Rather than holding the costs of government, HB-707 will
take us in the opposite direction and should not pass.

Thank you for your time and consideration.



The Big Sky Country

SENATE AGRICULTURE

EXHIBIT NO. 14

DATE 3/15

BILL NO. HB 707

MONTANA HOUSE OF REPRESENTATIVES

March 15, 1989

Testimony H.B. 707

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

I am Vernon Westlake, Representative H.D. #76, in Gallatin County. I am appearing in opposition to H.B. 707, together with many opponents from the Gallatin Valley. At this time, I want to present to the Committee, if I may, several lists of water rights holders who want to be on record in opposition to the bill, and their reasons.

The proponents have said that this bill does not change anything affecting existing water rights under Montana statutes. Mr. Chairman, I disagree, I believe there are at least five (5) major changes.

Number (1): Section 1, Page 4, Lines 19 & 20, giving the Dept. of Fish, Wildlife and Parks the authority to lease water for instream flow to enhance fish, wildlife and recreation in accordance with a new Section, Number (4).

Number (2): Section 1, Page 5, Lines 7,8 & 9, Subsection (C), giving the Dept. of Fish, Wildlife and Parks the authority to lease water in free flowing streams, again in accordance with new Section (4) Under existing statutes, the Dept. can only lease water from Federally controlled impoundments.

Number (3): Section 2, Page 7, Lines 23 & 24, again in accordance with new Section 4, would authorize water rights to be leased for use not requiring a diversion, as is required in the Prior Appropriation Doctrine.

Number (4): Section 3, Page 14, Lines 6,7,8 & 9, again in accordance with new Section 4, a leasor would not be subject to the "use it or lose it" abandonment requirement in existing statute.

Number (5): New Section 4, Page 16, Lines 12,13 & 14, again in accordance with new Section 4, allows a pre-1973 priority date to be used for instream flow.

H.B. 707 is much more than a pilot project to keep fish alive during a critical low flow period. The bill includes recreation, which definitely requires a larger stream flow. It changes the Prior Appropriation Doctrine. It allows for up to 10-year leasing, and could jeopardize water rights under a "use it or lose it"



The Big Sky Country

Ex. 14
3/15/89
HB 707

MONTANA HOUSE OF REPRESENTATIVES

March 15, 1989

Testimony H.B. 707

Page 2

requirement. It allows for leasing in free flowing streams.

Leasing will create an adverse effect, junior appropriators will object and litigation will result.

The bill should require responsibility by the Dept of Fish, Wildlife and Parks for costs of a prevailing objector for adverse impacts or effects.

The bill does not recognize the need for water commissioners, or who will be responsible for the costs. The Dept. must be responsible for waiving its right to object to other water use on the stream during the period of lease.

H.B. 707, for a bill that doesn't change anything and is purely voluntary, I see many changes and I have great concern for our 100-year old Montana water law.

Thank you.

I am Ronald F. Waterman, Attorney at Law, practicing in Helena, Montana. I appear on behalf of the Montana Stock-growers Association, Montana Cattlewomens' Association and Montana Association of State Grazing Districts in opposition to House Bill 707.

These agricultural organizations testified earlier in opposition to House Bill 707 before the House Natural Resources Committee. Some changes have been made to House Bill 707, but there remain a number of reasons why these organizations continue to oppose this bill. One reason deals with fundamental philosophies. The other reasons flow from specific areas of the bill.

In opposing this legislation, these agricultural organizations do not ignore the problems the past drought has had upon Montana's streams. Livestock producers have been affected by drought. They know and understand the consequences the drought-like conditions caused, not only to their own operations, but also to the State's stream, its fisheries and its wildlife. Nevertheless a recognition of the drought does not justify approval of House Bill 707. The bill contains numerous problems.

The first fundamental problem these agricultural organizations have with House Bill 707 is the underlying concept of allowing an individual who is not using a water right to lease

the same to another party. Water rights are unique property rights. They rely exclusively on use to warrant their continued existence. A water user may assert a claim through court filings for a certain quantity of water for a period of water use. However, if the actual use is less, the actual use controls and determines the amount of the water right. A water right is exclusively a use right. Without actual use, a water right does not exist. Likewise, when a water right is not used the water becomes available to satisfy junior appropriator rights in the source of supply. This prevents waste and assures the water in a source of supply is continually put to a beneficial use.

Leasing contains the assumption that an individual owns a right which can be leased to another. A water user who does not put water to a beneficial use does not have a water right capable of being leased to a third party. When a water user declines to put water to a beneficial use, that water is then subject immediately to junior appropriators rights. A water user who does not place water to a beneficial use simply has no water right available to lease to a third party.

House Bill 707, even in its amended form, contradicts this fundamental concept of water law. The bill suggests that a water user who does not place water to a beneficial use nonetheless can lease the water to a third party. The water user who does not put water to a beneficial use simply has no water

to lease. For this reason alone, the concept behind House Bill 707 is contrary to applicable water law and for this reason the agricultural organizations appear in resistance to this bill.

When this bill was pending before the House, the organizations opposed the bill because its announced purpose was to address drought conditions while the bill itself never identified the fact the legislation would be used only when a severe drought occurred. The organizations felt and continue to feel the bill places inappropriate emphasis upon the enhancement of stream flows for fish, wildlife and recreation without adequate recognition that the bill should be a mechanism used only "during critical, low flow periods caused by drought."

The House made a partial concession to this issue by inserting in the bill following the phrase "fish, wildlife and recreation," the concept that stream enhancement is appropriate only "during critical low flow periods." However the problem which the agricultural organizations addressed has not been completely resolved by this amendment. There remains a flaw in the bill with the continued use of the word "recreation" and that word should be deleted from the bill. This deletion is warranted for one of two reasons. The word "recreation" duplicates the concepts of protection of fish and wildlife values and therefore is redundant and should be deleted. If the word "recreation" is not redundant, then the word would allow stream enhancement during drought conditions of sufficient quantities

to satisfy a recreational flow requirement separate and above flows sufficient to protect fish and wildlife and adequate to permit boating, floating and other water recreational activities.

The question posed is, during a drought, with the ability to protect fish and wildlife in place, whether the State of Montana should be leasing water for other recreational activities. The word "recreation" alone underscores that the bill creates a conflict between agricultural and sportmen groups within the State. Acquisition of water for floating and other recreational needs will only assure that agricultural interests and concerns will be forced to bear the brunt of any future drought.

As water users spread waters upon the land, the result is not only the growth of a crop and the watering of livestock; the water also charges aquifers and springs which benefit not only the water user but also adjacent land owners. Especially during a drought, action which will result in the drying of springs and aquifers will have far-reaching, consequential effects upon land owners adjacent to the water user who leases water to the State. In stream flow enhancement will have off stream flow affects.

The agricultural organizations continue their objection to the amendment contained in Section 1, amending Section 85-2-102(1)(c), MCA. A lease as described in the bill is a

lease of an existing right. Such a lease should not be defined as a new appropriation by the Department, as is suggested by this provision. This section suggests that a lease becomes a separate appropriation and a separate right of the Department, Wildlife and Parks. This language on page 4, lines 19 and 20 of the bill, should be deleted.

There is no question that a lease, if authorized by statute, must be recognized as a beneficial use to avoid the argument that by leasing the lessor has abandoned the water right. This protection has been added by the amendment in Section 1, amending Section 85-2-102(2)(c), MCA, found on page 5, lines 7 through 9. The language identifying a lease as an appropriation should be stricken however.

Before the House, the agricultural organizations identified a conflict between subparagraph 5 of Section 4 and Section 10 of the bill. The act terminates on October 1, 1999. A lease entered into for 10 years cannot be renewed for an additional 10 years, as permitted by Section 4, because the underlying authority for the leasing concept, this legislation itself, will have expired in 1999. Regardless of when entered into all leases will terminate by application of Section 10 of this bill. It is unrealistic to insert renewal language in the bill, especially renewal language allowing renewals beyond 10 years from the passage of the legislation. The agricultural organizations requested this conflict be addressed by the House

Natural Resources Committee and there was some agreement advanced that a lease would be said to terminate either upon its expiration or the termination of the act, whichever event was later. This type of an amendment would otherwise clarify an ambiguity in the present legislation which only promises future litigation.

Subparagraph 10 of Section 4 places on the Department the costs of measuring devices and the cost of personnel to measure stream flows. It is likely that whenever a lease occurs, a water commissioner will have to be appointed to regulate the flows of the water throughout all measuring devices on the stream. Subparagraph 10 should be broadened to assure the Department is included as a stream user responsible for bearing a portion of the costs of any water commissioner appointed on a stream where there is a lease.

This legislation is proposed as an "experiment". To retain its truly experimental nature of this legislation, the number of stream reaches affected and the length of each lease should be at least cut in half and the concept should be phased into application, leasing first on only two stream reaches, with authority to broaden the leasing of further reaches if no adverse impacts have been identified in the first leases. Moreover, there is a practical reason to shorten the period of the lease. Until a lease has run its term, the Department of Fish, Wildlife and Parks may well argue it cannot assess all

adverse impacts of a leasing program. With authority for a 10 year lease, this may mean the full impact of a leasing program is not fully identified until the entire authorization for this legislation has expired. This legislature should not permit the Department to avoid an analysis of adverse impacts because the lease has not yet expired. The lease terms authorized by this legislation should be shortened to five years each lease period.

Again in the House, the agricultural organizations criticized this legislation upon the ground it failed to limit the Department to the role it would play on a stream once it became a lessee. The Department, if it intends to exercise a lease, should be required to waive the right to object to any other water use applications on the stream during the period of the lease. The Department of Fish, Wildlife and Parks with its resources, should it become a lessee of water, could potentially fund broad objections which would prevent future development of a stream unless the Department's ability to file those objections is waived through passage of this legislation.

It is necessary to return to the beginning however, to underscore the fundamental problems with this legislation. Water leasing is a concept which makes material alterations in the existing water law and fundamental alterations of private property rights. In noting this fact, the issue raised is whether these changes are appropriate and necessary under the

circumstances. More specifically, the question arises as to why this legislation has been pursued.

One explanation is that the legislation will avoid future litigation. There is no guarantee of that result. Indeed the supporters of this legislation today may well be the plaintiffs in tomorrow's litigation. After all, these groups can easily claim the legislation as passed was not the legislation as proposed and the trade off of passage to avoid litigation was extended only regarding the initial legislation. Moreover, we have learned that even if the current supporters of the legislation may not be transformed into tomorrow's litigants, members of the same groups can reorganize into another group and carry the issue into the courts. Passage of this legislation does not avoid the potential of litigation.

In fact, the opposite is likely true. Once the legislature recognizes a water right is something more than a use right, the burden upon those who seek to acquire instream flows will be lessened considerably. As the legislature proceeds to alter and change water law, it is engaged in an action which has fundamental and far-reaching adverse effects upon all water users in this State.

Likewise, it has been suggested that this legislation is an alternative to passing of a more far-reaching initiative on the same subject. Again, there have been no promises offered or guarantees advanced that passage of this legislation will

end the desire of some groups to acquire minimum instream flows unavailable for any water development. The issue remains, moreover, of whether any initiative could successfully divest appropriators junior to the lessor of their vested property rights. Clearly, an extreme initiative would result in a court challenge and those opposing unregulated instream flows and the concept of leasing of water rights will have a better challenge to such extreme legislation, regardless of its form. The people of this state cannot divest water users of vested property rights. There is no authorization to any attempt to exercise eminent domain over those rights. Any restriction on existing water rights would be an unconstitutional taking of a vested property right and unlawful.

The concept of water leasing clearly is new and a unique way of addressing drought-related stream flow problems. As set forth above, House Bill 707 advances this concept in an inappropriate manner. The agricultural groups I represent recognize however there may be some need to experiment with this concept on a few limited stream reaches. My clients would consider and evaluate legislation which was site specific and limited to only one or two stream reaches with identified quantities of water to be leased and with the disclosure of the parties who would be affected by the lease. This information is likely to already be in the possession of the Department of Fish, Wildlife and Parks. Any leasing bill should require

specific sun-setting to assure that the experiment retained its character of an experiment and that the bill did not provide an opportunity to expand the concept of leasing beyond its experimental stage until the full ramifications of a water leasing program have been evaluated both scientifically and by future legislators.

With all due respect to the sponsors of this bill, for the reasons set forth above, I do not believe that House Bill 707 is justified. House Bill 707 will not resolve the instream flow controversy. House Bill 707, instead, will only impose upon some water users an unwarranted experiment which should not be pursued by the State of Montana at this time.

For all of these reasons, Montana Stockgrowers Association, Montana Cattlemens' Association and Montana Association of State Grazing Districts oppose House Bill 707 and ask this committee to vote "do not pass" regarding this legislation.

7868R

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

SENATE AGRICULTURE

EXHIBIT NO. 16

DATE 3/15/89

BILL NO. HB707

Hearing on House Bill 707:

We, the undersigned, are very opposed to leasing of water rights during critical low-flow periods for instream flow, particularly for recreational purposes.

Our major concerns with the legislation are:

- (1) The changing of the Prior Appropriation Doctrine by eliminating diversion for beneficial use and allowing a pre-1973 priority date for instream flow.
- (2) A definite possibility that a 10-year lease for instream flow might constitute abandonment by reason of the "use it or lose it" principle.
- (3) The creation of adverse effect on junior appropriators with litigation as the only resort.
- (4) Ten-stream reaches and 10-year leases are way beyond the original intent of a pilot project.
- (5) The bill does not recognize that a water commissioner will be needed, nor who will be responsible for costs.
- (6) The Department of Fish, Wildlife and Parks must be required to waive its right to object to other water use on the stream during period of lease.
- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

Name

Address

Organization

<i>Mike J. Todd</i>	<i>24427 Norris Rd. Bozeman</i>	<i>HPR, High Line Canal Water</i>
<i>Herman Vander Voo</i>	<i>24228 " " "</i>	
<i>Jul Brz</i>	<i>13890 Churchill Rd. Manhattan</i>	<i>High Line Canal water use</i>
<i>Ken Van Dyke</i>	<i>2062 Bitterroot Rd. Bozeman</i>	
<i>Alex B. Vimmer</i>	<i>3855 Anderson Rd. Manhattan</i>	
<i>Jake Kuttinga</i>	<i>15335 Churchill Rd. Manhattan mt.</i>	
<i>Jack Braabom</i>	<i>15520 Churchill Rd. Manhattan mt.</i>	
<i>Ed DeLahun</i>	<i>11755 Churchill Rd. Manhattan mt.</i>	<i>High Line Canal</i>

March 15, 1989

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

SENATE AGRICULTURE
EXHIBIT NO. 17
DATE 3/15/89
BILL NO. HB 707

Hearing on House Bill 707:

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Name

Address

Organization

Richard D Baylon

1812 Wilson Way

Middle Creek

F. Boyle

5773 Bigelow Rd

Hoy Ditch Co.

Harry Dusenberry

5170 Johnson Rd.

Middle Creek Ditch Co.

Bert Dusenberry

5530 Stucky Rd

The Middle Creek Ditch Co.

Lloyd Rafferty

7035 S. 19th

Hoy Ditch

Glen O. Kraft

5555 LOVE LN

WEST GALATANA

K. ...

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

SENATE AGRICULTURE
EXHIBIT NO. 18
DATE 3/15
BILL NO. HB 707

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<u>Name</u>	<u>Address</u>	<u>Organization</u>
<i>John J. Morrow</i>	<i>1103 So Wilson</i>	<i>Kuylen Ditch Co</i>
<i>John R Van Dyke</i>	<i>6353 Delta Dr</i>	<i>" "</i>
<i>John A Brown</i>	<i>4605 Canyon Blvd</i>	<i>" "</i>
<i>Lind Kamps</i>	<i>3270 Lee Rd Manhattan</i>	<i>" "</i>
<i>Arthur D Bos</i>	<i>8070 Churchill Rd.</i>	<i>" "</i>
<i>Vince D. D...</i>	<i>7198 River Road</i>	<i>Kuylen Ditch</i>
<i>Harold J Kin...</i>	<i>7735 Churchill Rd.</i>	<i>" "</i>
<i>Dary Bos</i>	<i>2840 Lee Rd Manhattan</i>	<i>Kuylen Ditch</i>
<i>Sam E Van Dyke</i>	<i>4285 Dyer Rd</i>	<i>Kuylen Ditch</i>
<i>M. Eugene Bryson</i>	<i>2040 Bryan Rd.</i>	<i>Kuylen Ditch</i>
<i>Robert G. ...</i>	<i>7701 Halladay Rd</i>	<i>Kuylen Ditch</i>
<i>Dwight Winchester</i>	<i>791 Roche Rd. Belgrade, MT</i>	<i>Farmer's Canal</i>
	<i>8104 Huffine Lane</i>	

W H Williams 10511 River Road Hi Line -

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

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- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

<u>Name</u>	<u>Address</u>	<u>Organization</u>
Jake Schutte	80650 Hal Rd	West Adair
Gerald Sacorsh	268 Jackrabbit Lane	Buck & Buck ditch co
Sherrill Leys	531 Cobb Hill Rd	Highline Canal
Bill Allende	11655 Prairie Rd	Highline Canal
Jon Allender	8500 Basin Blvd Bogman	Keighen Ditch
Kenny J. Visser	10700 Visser RD Manhattan mt.	High line Canal co.
Phil Linnema	10040 Compact Rd Manhattan, mt.	High Line Canal co
Alvin J. Bolhuis	17177 Norris Rd Manhattan, mt.	MAMOTH Ditch
Ray Bolhuis	Manhattan Mt.	Low Line Canal
Ernie Sandmolen	Manhattan, mt.	High Line Canal
David Pruitt	28284 Norris Rd Bogman, mt.	Toulin Canal
James L. Hays	13 Arrowhead Rd Bogman, mt.	Buck & Buck ditch
Stan Illhove	24 Bedford Road Bogman	Middle Co Supply

Ex. 18
3/15/89
HB 707

Senate Agriculture Committee:

Senator Tom Beck, Chairman:

Senator Gerry Devlin, Vice Chairman:

Hearing on House Bill 707:

Ex. 18
3/15/89
HB 707

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- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

<u>Name</u>	<u>Address</u>	<u>Organization</u>
George Cook.	7272 River Road	Kueghen Ditch
Ray Schultz	Bozeman Mt.	
Bruce H. Visser	81393 Bullator Rd.	
	Bozeman, Mont.	
Albert Bellus	10633 Visser Rd.	
	Manhattan, MT.	
	Bozeman Mont	Kueghen Ditch

Senator Tom Beck, Chairman:

EXHIBIT NO. 19

Senator Gerry Devlin, Vice Chairman:

DATE 3/15

BILL NO. 110707

Hearing on House Bill 707:

We, the undersigned, are very opposed to leasing of water rights during critical low-flow periods for instream flow, particularly for recreational purposes.

Our major concerns with the legislation are:

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- (7) The Department of Fish, Wildlife and Parks must be responsible for the costs of prevailing adverse impacts on the existing appropriators.

Name	Address	Organization
Tom Beck	517 1000 Ace Orchard Rd CORVALLIS MT.	President-Mtn View Water Dist. Co.
Gerry Rosecup	14518 Foothill Rd St. Ignace Mt.	Member Flathead Irrigation Dist.
Stanley J. J.	6870 Amsterdam Rd Manhattan MT.	Member Lowline Canal Co.
Jerry E. Leg	8280 Highline Rd. Manhattan, mt.	
Robert B.	1767 Yarrow Rd. MANHATTAN, mt.	MEMBER HIGHLINE CANAL CO.
Lick Visser	Manhattan mt.	
Maynard O. J. Lillano	Manhattan, Mont.	
Joe W. Albroda	Manhattan mt.	
Jacob B. Cook	" "	
James B. J.	Manhattan mt.	
William K.	" "	
		Highline Canal Highline Canal Lowline Canal Co. " " Highline Butte Co. Lowline Canal



EXHIBIT NO. 20
3/15/89
MONTANA FARM BUREAU FEDERATION

502 South 19th • Bozeman, Montana 59715
Phone: (406) 587-3153

HB 707

BILL# HB 707 ; TESTIMONY BY: Dave McClure

DATE Mar. 15, 1989 ; SUPPORT _____ ; OPPOSE Yes

Mr. Chairman, members of the committee, I am Dave McClure, a farmer-rancher from the Lewistown area and currently president of the Montana Farm Bureau, an organization of over 3600 member families. We oppose HB 707 because of policy statements established by our voting members who are active farmers and ranchers. We do want to cooperate and participate in solving problems regarding the use of our water resources in Montana. We recognize and share the concerns of many other groups and the legislature. Our policy states:

"We support the theory of additional water storage to increase availability of water for agriculture and recreational use as well as to increase instream flow."

"We oppose any instream flow legislation unless it is based strictly on additional storage."

As you can see, we support the idea of maintaining stream flows and feel that this is best done by storing, spreading and using water for Montana. This type of plan can benefit all Montanans with economic activity, development and future growth of our water resources for late-season stream flow.

We have genuine concerns about several issues contained in HB 707 and the concept of leasing water rights for instream flow. The possibility of litigation and costs to protect down stream of junior water rights is real because this is a major change in the definition beneficial use. Also, since federal law does not recognize instream flow as a beneficial use, will this change cripple Montana when down stream states lay claim to unused flows? We are concerned about putting a leasing plan into effect before the adjudication process is complete.

During severe drought such as in 1988, we cannot solve all problems by moving a limited quantity of water around. We feel that current water projects, which provide much recreation as well as irrigation, held water back for more late season flows than in past droughts, as in the 30's. By many accounts the 1988 drought was more severe than any other. Farmers and ranchers were severely harmed by the lack of water in 1988. They had to haul feed to cattle or haul the cattle to feed and water and in some cases haul water to the cattle that were not sold off. All this in addition to lost crop production. We, more than any other group do not want to experience another year as dry as 1988. We sincerely hope that HB 707, which is to some extent a knee-jerk reaction to the 88 drought, does not cause more harm.

Lastly Farm Bureau pledges cooperation and support in funding projects as in support of HJR 22 for Pick-Sloan funding. The support of water use efficiency as in HB 461. We do not feel that confrontation with other groups here in Montana is the best way to solve problems. However Montana Farm Bureau must represent the best interests of agriculture and we sincerely believe that water leasing for instream flow is not the best solution.

SIGNED: Dave McClure

SMITH 6 BAR S LIVESTOCK

P. O. BOX 107

GLEN, MONTANA 59732

406-835-3441

March 15, 1989

SENATE AGRICULTURE

EXHIBIT NO. 23

DATE 3/15/89

BILL NO. HB 767

Randall Smith

To the Members of the Senate Agriculture Committee:

We are ranchers in the Big Hole Valley near Glen. We use water for irrigation from the Big Hole River and two of its tributaries, Divide Creek in Silver Bow County, and Willow Creek in Beaverhead County.

We are strongly opposed to HB 707 for the following reasons:

1. No action, or even discussion, should take place on a proposal to lease water rights before all streams in Montana have been adjudicated. Most streams that are not adjudicated yet have had water rights filed on them that are greater in amount than the flow the streams produce. Those rights, through beneficial use of the water, are dated prior to July 1, 1973. These are historic water rights that go with the land.
2. Streams that are already adjudicated, such as one creek we use for irrigating, often leave junior water rights holders without their specified water rights in late summer if streamflow is below normal. Any water not used by the senior water right holders (our water rights, for example, date from 1877 into the 1880s) belongs to the junior water rights holders so that their water rights are filled. No one should have the right to take that away from them. There is always a certain amount of water in our creek anyway, even in dry years like last summer, and that water flows into the Big Hole River. The creek is never completely dry.
3. Leasing water rights takes water that historically goes with the land. It has had to be diverted from a stream for beneficial use in order to have the right to use it. Irrigating actually stores the water in the land gradually releasing it back into the stream from which it was diverted. If water formerly used for irrigating is allowed to flow down the rivers or creeks through leasing, that storage benefit is lost. Irrigating is what has historically saved stream flows in the late summer months.
4. We do not believe recreation should be considered a beneficial use of water.
5. We believe small upstream storage of water would be far more beneficial in maintaining water flows than leasing of water rights.
6. When water is not used on the land it flows down the streams and out of Montana. That old phrase "use it or lose it" is still valid.

We believe our reasons for opposing HB 707 are valid and urge you to kill this bill.

E. Maynard Smith
E. Maynard Smith

Name Ole Ueland Bill No. HB 707

Address RR3, West Browns Gulch Road, Silver Bow, Mt. 59750

Whom do you represent? Headwaters Agriculture Water Resources Committee

Support ☐ Oppose ☒ Amend ☐

- #1) Leasing of water rights (or selling) by irrigators to Fish Wildlife and Parks runs the risk of jeopardizing or losing ones right. It is an admission that water is not needed for his use. This could go against one in a court case. By relinquishing ones need for the water means that the next junior users on the stream are next in line for the use of the water by the PRIOR USE DOCTRINE. Claiming of water for a new use by leasing or purchase is a lot more complicated than meets the eye. It would be very expensive. Agriculture water users would like assurance that any burden of proof be born by the entity proposing a change.
- #2) Perhaps the most likely argument against leasing of water from agriculture to fishery and/or recreation is not recognizing that the water is more valuable for agriculture. A fishery or recreation interest would likely need to pay an amount equivalent to its value for agriculture. What is worth more? The agriculture product or the fishery product, and/or the preservation of prime (irrigated) farmland?
- #3) No action should be permitted that would take away from an established beneficial economic use such as agriculture and the impact it has on the community. Instead it would be wiser to look for alternatives, the main one being STORAGE of high water runoff to be used later when low flows for a number of beneficial uses are critical. Thru storage all beneficial uses could be maximized instead of taking from one to satisfy another (lesser) use.

It is the recommendation of the HEADWATERS AGRICULTURE WATER RESOURCES COMMITTEE (a seven county organization within Granite, Powell, Deer Lodge, Silver Bow, Jefferson, Madison and Beaverhead) to oppose leasing of water rights. If it is the wisdom of the legislature to permit leasing, then please consider amending HB 707 so that research be done on the environmental, economic, and social impacts of leasing; and that before leasing is permitted that the alternative benefits of storage be fully investigated.

The Headwaters Agriculture Water Resource Committee is willing to cooperate and work with legislature, state agencies, and the many water interest groups in solving water shortages. Water is a valuable resource. We feel that by all beneficial uses (users) contributing financially to various methods of storage, we can solve much of the fishery and recreation needs as well as irrigators and many other water use needs. Thank you for your kind attention.

(over)

The series of meeting the INRC held recently across Montana re suggestions for the State Water Plan emphasized additional storage as the high priority need to help out for providing water for all beneficial uses:

- storage mainly of the dam and reservoir type preferably offstream, upstream, tributary
- storage thru better water conservation practices such as improved irrigation water management and water spreading, and range management practices to store water in the soil profile and contribute to ground-water and springs which feed the streams
- help the beavers with their dams
- act on new inovative ideas such as storing water for late use thru formation of icebergs in the winter time
- storage to provide water for instream uses for fishery, for water quality, for hydropcwer, for recreation, for riparian, for use many times over
- storage for drouth relief
- storage for supplemental water for most of the irrigation water rights which are not fulfilled thruout the irrigation season
- storage to provide water for develcping the potentially new irrigable lands
- storage to provide water for industry
- storage to provide water for econoric development
- storage for flcod prevention, watershed protection
- storage for domestic and municipal use
- storage for groundwater recharge
- storage for downstream state benefits of flcod control, navigation, irrigation, etc.
- storage for which all the above are beneficial

I would like to protest House Bill No. 707. I think that it is very poor management for the government of the State of Montana to even think of leasing or selling the water rights away from the land that it is recorded to, until the water is properly adjudicated and taken care of. A few years back the State decided the water in Montana had to be rerecorded and properly adjudicated, so that we could legally keep our water here in the State. Now you want to pass a bill to lease the water to someone so they can let it run out of the State, before we get it all adjudicated, that doesn't make much sense to me.

I think we should take a hard look at how a bill like this could effect our tax base in the State if it were used on a larger scale. Thirty per cent of the total revenue of Madison County is generated through ranching and agriculture. I am sure that a good per cent of that is generated through irrigation being that twenty per cent of the irrigated land in Montana is in Madison and Beaverhead Counties.

I can not see, in my own mind, how water could be leased for instream flow during a critical low water time without affecting the other water users on the stream.

I am a rancher and irrigator on the lower Big Hole River, and a tax payer in Madison, Silver Bow and Beaverhead Counties. I am very concerned as to how this bill could affect the state of Montana.

Bill Garrison
Glen, Montana
Bill Garrison

SENATE AGRICULTURE

EXHIBIT NO. 21

DATE 3/15/89

BILL NO. HB 707

WITNESS STATEMENT

NAME James Monroe

BUDGET

HB 707

ADDRESS

Box 287 Darby, Md. 59829

WHOM DO YOU REPRESENT?

Monroe Ranches

SUPPORT

OPPOSE

AMEND

COMMENTS:

see Exhibit 21A

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

I am Louise Conner Monroe from the upper Bitterroot Valley. My husband, John Monroe, owns land and water rights on the Tin Cup drainage, my son Michael Conner and I own land and water rights on the Chaffin Creek drainage, and my husband and I own land in the Sula Basin. Our water rights in Sula are on the East Fork River and Camp Creek. None of us have any intention of leasing our water rights but we are all concerned over the Fish and Wildlife's "foot in the door" approach to solving the low water problems in our creeks and rivers.

Granted we have had several "critical low flow periods" the last several years, but it has been even more critical for agriculture than for the fish and recreationists. My home is on the banks of the Bitterroot River and I love to see the river full of water and see the fishermen floating by on their rafts but not at the expense of agriculture!

I have several questions that have come to mind after reading House Bill 707 and I hope you committee members will research these questions and consider the testimony of others carefully before voting on this bill.

It has always been my understanding that there is a law that the water stays with the land and can not be sold or traded away from the land it was appropriated for. It has also been my understanding that when you shut your water off temporarily for haying or harvest that you can't let your best friend use your water, you have to turn it back into the creek and let those with the next water rights use the water. If no one else needs the water it will then flow into the river. If the Fish and Wildlife is allowed to lease water rights, will their only claim on the water be during "critical low flow periods" or will they be able to take their leased water during high water as well? Who decides when it's a "critical low flow period"? Is the purpose of this bill to make an exception to existing laws for the benefit of the Fish and Wildlife? It seems to me, if you're going to allow a landowner to lease his water to the Fish and Wildlife, he should be allowed to lease his water to the highest bidder—be it agriculture, industry or the Fish and Wildlife!

Won't any leased water eventually find its way out of state and can the Fish and Wildlife sell their leases as the water passes out of state?

Suppose a man was about to lose his ranch to a lender and he decides to lease his water for ten years. What recourse does the lender have if he gets the land back without water rights?

Nearly all of our mountain canyons in the Bitterroot Valley have potential dam sites for water storage but because of wilderness restrictions we are prohibited from building new dams. Why doesn't the Fish and Wildlife try to get a few wilderness laws changed and build dams for water storage instead of jepordizing existing Montana water rights?

I urge you to vote against House Bill 707. Thank you.

STATE AGRICULTURE
DATE 3/15/89
BILL NO. HB 707

March 15, 1989

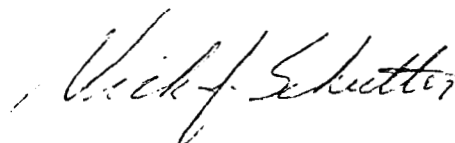
To the Chair-person and Members of the committee hearing HB 707.

For the record, my name is Nick Schutter, and I am a farmer in Gallatin County.

Currently every user on any particular ditch or canal shares in the loss of water in that respective canal due to seepage and evaporation. Now if you take for instance a long canal, say of 40 or 50 miles. If a significant number of the users on the upper end of the canal lease their water out, it would be highly unlikely that the users on the lower end of the canal could receive even close to their full water right because of reduced flow, and the people that lease their water right out are not sharing in the loss due to seepage and evaporation. I don't find any protection for these people against this happening in this bill.

This bill also states that the Department of Fish, Wildlife, and Parks shall pay all of the costs associated with installing measuring devices or providing personnel to measure streamflows. I assume then that this is taxpayers money being used here. Quite frankly, I do not care to see the money I pay in State Income Taxes spent in this way.

For these reasons, I urge you to oppose House Bill 707.



Nick J. Schutter

Amendments to House Bill No. 707
Third Reading Copy

EXHIBIT NO. 26
DATE 3/15/89
BILL NO. HB 707
Mark E. Fehard

Requested by Senator Hammond
For the Committee on Senate Agriculture

Prepared by Deborah Schmidt
March 15, 1989

1. Page 3, line 10.

Following: "program."

Insert: "Because the Milk River Basin is chronically water short, and because it is the subject of considerable negotiation of federal and Indian reserved rights, leasing should not be undertaken in this basin until these issues are successfully resolved."

2. Page 14, line 15.

Following: "~~The~~"

Insert: "Except for the Milk River basin,

3. Page 15, line 12.

Following: "by the"

Strike: "lessor"

Insert: "lessor's crop, if applicable, and excluding water used as recharge or return flow"

SENATE AGRICULTURE

EXHIBIT NO. 27DATE 3/5/81BILL NO. HB 707

Dear Senator Hammond

I understand that HB 707 is to be heard by the Senate Agriculture Committee on Wednesday, March 15th at 1:00 O'clock. Etchardt

This is the bill that deals with instream flows for fish and recreation and comes from the study for a new State Water plan. This looks to irrigators like the Sportsmens way of taking over some of the water which is put to beneficial use by agriculture now.

The bill is potentially dangerous because if the water rights purchased are at the head end of the stream they become in effect a consumptive use. The bill does concede that only the "consumptive use" portion of the water rights leased could be used but if this were not calculated accurately the downstream ag users might be denied the benefits of the return flows and there could be a change in the recharge of underground aquifers which would affect livestock and domestic wells and springs as well as actually hurting instream flows which would be diminished at a later time from not getting the benefit of underground and surface recharge and return flow to the original stream.

In the Milk River the water is diverted several times on its way down the river and used over and over again (Incidentally this produces considerable instream flows in the proces). For example 10% of a 1200 cfs release from Fresno Dam if purchased in the Chinook division would be 120 cfs. If this same 120 cfs were passed down the river to the last diversion on the milk, which is the diversion for the Glasgow Irrigation District at Vancalia Dam, it would be 60 % of the water available if there were only 200 cfs to divert at Vandalia (which often happens in periods of water shortages).

My view is that the bill should be killed and further study should be made in the various drainages to see what the actual effect would be, and if this could not be accomplished by the addition of more storage. This storage could increase the total water supply by impounding floodwaters which flow out of state in the spring and are gone when we need them later on.

Amendments should be prepared for the bill which would:

1. Define "consumptive use when figured for purposes of instream flows as the amount of water that is actually used by the crop itself.
2. The Milk River Basin should be amended out of the bill since we have too many water problems at this time to allow this type of appropriation which might further disrupt our water supply (at least until we get our supplemental water supply in place). If instream flows are needed in the Milk River Basin then the Fish and Game Department should join in the project and increase the supplemental water supply by the amount of additional water they deem necessary (and of course also pay for it).

3. There is presently a moritorium on new appropriations of water from the Milk which might apply to a change of use such as

March 14, 1989

EXHIBIT NO.

28

DATE

3/15/89

Mr. Chairman and Members of the Committee:

BILL NO.

HB 707

1. Regarding leasing water for the purpose of enhancing stream flow for Fish, Wildlife and Recreation during low-flow periods; From reading this proposed bill, it is obvious that the drafters of this bill have done alot of work and have done their best to address all of the problems. However, there are several things that bother me about this proposed legislature.

1. Approximately 10 years ago we farmers and ranchers were required to refile on existing water rights for the purpose of readjudication. We faced a deadline, with failure to comply being the loss of our water rights. My understanding is that the State has not completed one single county thru the re-adjudication process, and now we are talking about leasing existing water rights that have not been re-adjudicated.

2. Secondly, the continued use of the word, Recreation. I don't think that any Farmer or Rancher has a problem with doing his best to protect fish and wildlife. If we are in a critical low flow, recreation should be the last on our list of priorities.

3. If a water rights holder leases his water to the Department of Fish, Wildlife and Parks for a 10-year period, and then during a critical low flow period his right becomes invalid because of the date of appropriation, what then is the departments role? Do they continue to pay for the water that they don't get, or do they just take the water, regardless of right?

4. My real fear is that this is a small step in the ever increasing erosion of personal property rights. It is simply a foot-in-the-door approach to total control of water by a Department of Fish, Wildlife and Parks or as it continually states, Fish, Wildlife and Recreation.

5. At the best, this really is a band-aid approach to our problem. In the Bitterroot at least there are many creeks that could be equipped with small dams or reservoirs where the water could be released during low flow periods and they would in fact increase the recreational opportunities in the Valley.

It would also behoove us to pay more attention to watershed management and doing those things that would stop the flooding we see every spring.

Lastly, no matter what we do as conservationists, agriculturalists environmentalists, or sociologists; everything in the end hangs on the understanding and application of our ideas by politicians. I hope that you will look at this problem as it relates to our whole economy, rather than a stop-gap measure to save the fish.

Thank you.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE IS NO EXHIBIT # 29 FOR THIS DAY.

March 15, 1989

Mr. Chairman and Members of the Senate Committee:

I am George Vogt from Ravalli County, where four generations of my family have irrigated with water from the Bitter Root River. We have used and shared this water, I believe efficiently and effectively.

Last year was the driest of my 82 years, but we still had crops and still have fish in our streams. People shared water with their neighbors and the fish. Additional water was released for them and the fish from private dams.

If I should lease my water right, and the lessee uses all the water ^{for stream flow} granted by my right, ^{all} those with newer rights below me ^{as well as the economy} may suffer particularly in dry years.

Another concern is that Montana is a long way from completing the adjudication process. According to some judgments, many water rights will be decreased significantly in volume. How can an owner of water rights lease water for ten years when he is uncertain to the amount he may be allowed?

Too, let's take off the wraps of this bill and see it as it really is. To me the main thrust of the bill (p. 9a - p. 11, - 47 lines) is permitting leasing of our water to out-of-state entities for ten years with right of renewals if certain conditions are met. Montana needs that differ from year to year must be kept in mind.

SEE PAGE 2

Ex # 30
3/15/89
HB 707

I strongly question why this purpose was omitted from the statement of intent of this bill. Montana's water has long been coveted by other states. This law obviously allows another foot in the door for out of state uses of our water with certain so called requirements, if met.

I assume that the committee is familiar with results of water leasing and purchasing in other states. I have been told that in South Park, Colorado, and other counties in that state there were leased or purchased water rights for considerable sums of money. Some owners still live on the lands, which now are unproductive semi deserts affecting the economy, the tax structure and the beauty of the areas.

May the Governor and this Legislature not be remembered for leasing Montana needed water to out of state users, and may we in the Bitter Root never have to say, "How Green Was My Valley."

I beg you, DO NOT PASS THIS BILL!

Thank you,
George Vogt.

SENATOR ELMER SEVERSON
SENATE DISTRICT 32
MARCH 15, 1989

WATER RIGHTS

WHAT IS A WATER RIGHT?

It is a right to a beneficial use of a given amount of water on a described tract of land with a priority date. The given amount in Montana is usually approximately one miners inch per acre, or one cubic foot per section for forty acres.

WHAT IS A PRIORITY DATE?

First in date of priority is first in right to use that water. Water is decreed to land and not to people. You cannot sell, lease or give away water, it is part of the land it was decreed to.

HOW DO WATER RIGHTS WORK?

First in date of right has first use. If first water is not in use, second water, in effect, becomes the first water and so on down the line.

Most streams in Montana are over adjudicated. Burnt Fork Creek, the first decreed stream in Montana is an example of that. It has had the first right in line in Montana, since 1852. If any right

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3/15/89
H8707

WATER RIGHTS
MARCH 15, 1989
PAGE 2

on this creek were to be filled on a given day, the creek at its highest point could not fill those rights, but it works. Use and re-use of this water, make the water shed a good one. Someone's used water is just as wet as fresh unused water from the creek.

WHAT HAPPENS IF YOU WERE TO LEASE AND SELL WATER?

If some of that water was not there for use and re-use, I will guarantee you that you will hurt people and take a valuable right and dollars in product away from them. This is the greatest departure from water law in the history of our state. It is throwing away 100 years of water law. We, in irrigated agriculture have learned to live with our present system. Please don't upset the system that is in place.

WHAT IS THE ANSWER TO IN-STREAM FLOW IN A DRY YEAR?

The answer is small off-stream storage. The day of large dams is probably over, but we have hundreds of sites for small dams. Stored water can be sold or leased. We have an abundance of water in the late spring that runs into the ocean helping no one and hurting many. This is the water that we should be talking about. Painted Rocks Lake, in the Bitterroot Valley, is a prime example of this. It is a lake that is used by boaters, fishermen, and irrigators and they have learned to work together. Water in-stream for irrigators -- makes water for fish. Painted Rock Lake is an

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WATER RIGHTS
MARCH 15, 1989
PAGE 3

excellent example of what can be done if people have the desire to work together.

THIS BILL IS AN OVER-REACTION TO A THREE YEAR DROUGHT THAT EQUALED THE DROUGHT IN THE 1930'S.

That drought is over! Let's not destroy the delicate balance of water use in Montana. I urge this Committee to put this monster to death with a majority vote from this Committee.

SSP/sd

Dan Bailey's FLY SHOP

209 West Park Street
P.O. Box 1019
Livingston, MT 59047
(406) 222-1673

EXHIBIT NO. 32
DATE 3/15/89
BILL NO. HB707

March 15, 1989

Chairman Tom Beck
Senate Agriculture Committee

Chairman Beck and Committee Members,

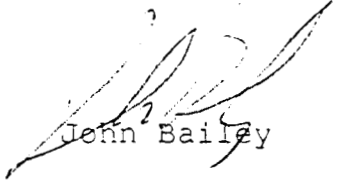
A great opportunity is at hand to let those who want to enhance stream flows for the protection of fish, wildlife or recreation to compensate those who control the water rights.

When one considers the agriculture growing season and the high and low flows of our rivers, one realizes the conflict between the two is short. By the time the first cutting of hay is done most streams still have plenty of water in them. Problems in the streams generally occur in the late summer. Since a lease will cost money, there is incentive to lease the smallest amount of water over the shortest time period.

Low flows during winter, when there is no irrigation, determines the carrying capacity of the stream for fish. We only need to lease enough water during the late summer season to maintain this capacity.

I am encouraged by the concept of this bill. I urge you to pass it giving us an opportunity to minimize low flow problems.

Thank you,


John Bailey

Honorable Committee Members,
Ladies and Gentlemen

March 15, 1989

My name is L. M. Powell

I am a Director on the Bitterroot Conservation District, a native Bitterrooter, a retired Forest Service Employee, a Professional Land Surveyor, the owner of two small, irrigated farms, and an avid fisherman.

Surely, with these credentials, there must be some conflict of interest.

First of all, I would like to congratulate our Legislators on the their diligent efforts in the careful preparation of House Bill No. 707. I am sure that they have attempted to cover every eventuality, and perhaps they have, but in my state of confusion I still have questions.

My companions, Richard Ormsbee, and Marshall Bloom have, or will discuss in detail the marvelous cooperation we have had in the Bitterroot in recent years between the Irrigators, Fishermen, Land Owners, The Fish and Game Dept. and others. We have found the expertise and willingness of Don Peters and others in various departments to be invaluable.

The subject of water leasing, in the land of the bloody shovels is bound to cause consternation among all of us who value our water so highly. That is why I'm sure others have unanswered questions as well as myself.

In recent years the increase in tourism and recreation use in our area has expanded tremendously, and obviously such use has resulted in increased income to many businesses and citizens. This occurs at a time when agricultural lands are diminishing and residential use increasing. Does this mean that irrigation use of water is any less important? In my opinion no.

Lewis and Clark classified the Bitterroot Valley in their journals as a barren wasteland, a condition that would exist today, were it not for irrigation. Would such a condition enhance the area for tourist enjoyment?

The fact is that many valid uses exist for our water, and all deserve our attention.

The following are some of the questions that I have:

1. What are stream reaches? Are they the main rivers? Do they include creeks?

Ex. #33
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HB 707

2. What is the purpose of out of State leasing, except to raise the hackles on our necks. Could someone want to irrigate the desert or fill swimming pools?

3. The bill states that leasing will apply to the valid rights as of 1973, does this mean that all of the effort and expense put into the new adjudication process was for not?

In view of our drought conditions over the past eight or ten years, one has to wonder where the slack exists for water leasing. I am more prone to consider means of increasing the supply of water by instream storage and other measures.

One example is Painted Rocks Reservoir. When the roads were reconstructed around the lake they were raised to a level that would accommodate an additional fifteen foot of water. Since House Bill 707 authorizes expenditure of funds for such projects, perhaps this could be considered.

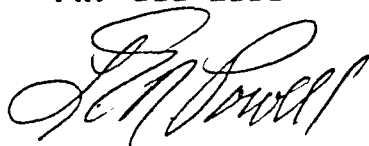
If "stream reaches" include creeks, there are some forty or so small dams in Ravalli County that could be reconstructed to store some of the flood waters that are not only wasted but cause considerable down stream property damage.

It has long been recognized that wasteful irrigation practices exist, but it is also a fact that economic conditions often preclude gearing up to a more efficient system. Perhaps some emphasis should be placed on the construction of gravity flow sprinkler systems from some of our west side canyons, whereby the water consumption could be greatly reduced and a greater amount made available for instream flow.

I appreciate the time you have given me and your consideration.

Thank You.

L. M. Powell
S. E. 405 Grantsdale Road
Hamilton, Montana 59840
Ph. 363-2116



HEARING
HOUSE BILL 707
MARCH 15, 1989
HELENA, MONTANA

EXHIBIT NO. 34
DATE 3/15/89
BILL NO. HB 707
Wilbur Anderson

Mr. Chairman, and members of this Committee, for the record my name is Wilbur Anderson. I am General Manager of Vigilante Electric Cooperative, with headquarters in Dillon, Montana.

Vigilante Electric provides service in portions of nine (9) counties in southwestern Montana and into the northern part of Clark County, Idaho. We also provide electric service to about 760 irrigation pumps in this service area totaling 44,000 H.P. These 760 irrigation pumps provide water for irrigation on about 80,000 acres of cropland.

Our irrigation consumers are very concerned about legislation which would authorize the transfer of water from offstream irrigation to instream use for fish, wildlife and recreation. We do not see how water transfers of this type can be made without some adverse affects on other users on these same streams. In short, we feel this would be a very dangerous precedent for all irrigated agricultural areas.

In the case of protests under the current system, the hearings are conducted by the Department of Natural Resources. This same Department has sold water out of projects such as Painted Rocks Dam in the Bitterroot Valley, and has promoted the concept of water transfer and use. We feel this is a very clear conflict of interest on the part of the DNRC.

One of the finest means of water storage is by use of water for irrigation. The second best storage means is by offstream and onstream storage dams. They both provide greater instream flows, and for longer periods each season. The instream flow problem should be addressed in a logical and common sense manner-- not by penalizing irrigated agricultural consumers.

We certainly concur with the testimony provided by the Water Users Irrigation Company of Lima Dam, and the testimony provided by Mr. Carl Davis from Dillon. The transfer of water is a poor concept for Montana and we urge you to vote against this legislation. Thank you.

Wilbur Anderson

Montana State

SENATE AGRICULTURE
EXHIBIT NO. 359

W.I.F.E.

HB 707

DATE 3/5/89

1 We believe more study ~~is needed to be done~~

We object to the provision that the rights holders must bear the burden of proof.

#2 We object to the IDHR maintaining jurisdiction of the water leasing

#3 Does the F.W.P pay their share of the distribution and cost of maintaining leased water?

I thank you
Shirley Bugli
Stevensville, Mt

WATER USERS IRRIGATION COMPANY
RICHARD WIEBER, SECRETARY
OWNERS OF LIMA DAM AND RESERVOIR
P. O. BOX 1046
DILLON, MONTANA

February 20, 1989

EXHIBIT NO. 56
DATE 3/15/89
BILL NO. HB 707

To the Senate Committee on Agriculture:
R.E. House Bill 707

Sirs:

The Water Users Irrigation Company presents the following specific objections to the wording and intent of House Bill 707.

We object to the wording of the title in that we believe that providing water for enhancing stream flows for fish and wildlife is sufficient. Recreation should not place a priority claim on water during times of critical shortage. We should not have to provide water for floaters and water skiers. The Title and purpose of the act should be rephrased to the "Purpose of enhancing or maintaining stream flow for fish and wildlife during critical low flow periods."

We object to a 10 year term for the leases since this concept is still untested and is largely experimental. A lease of 5 year duration with a termination date for the act on October 1, 1995 would be adequate to see how this is going to work.

The act provides that the maximum amount of water that may be leased is the amount historically diverted by the lessor. This wording must be changed to state, "the amount of the lessors appropriation." That is all that can be legally leased. In many instances irrigators have consistently diverted much more water than their appropriation, but have no legal claim to that water especially during periods of critical water shortage.

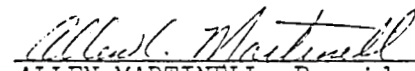
The act must provide for adequate notice to all parties on a stream reach by certified mail when leasing is proposed.

The act must provide specific details as to how the leased water is to be measured. Who is to do the measuring, and how far the leased water must be maintained in the stream.

It is our belief that a water right is only recognized to the point of diversion from the stream. Maintaining that right instream beyond its point of diversion adversely effects the other users on the stream and is against the intent of current water law. Once the water flows past the point of diversion the water right holder forfeits his rights to the water. The water is then available for use by the next right in time on the stream.

Water cannot be created during a drought. It can only be stored in times of surplus to supplement the low flows of the dry periods. One means of storage we have already mentioned is the underground storage resulting from irrigation and natural precipitation. Another method is by building storage dams to supplement periods of low stream flow with water stored in times of excess flows. These are proven methods of maintaining stream flows. Leasing of water rights will not make any water and is unproven in its effectiveness in maintaining instream flow.

For the duration of this act leasing of water rights must be limited to five or less sight specific stream reaches in the State of Montana. The stream reaches to be selected by the Department of Fish, Wildlife, and Parks and approved by the Board of Natural Resources and Conservation.


ALLEN MARTINELL, President

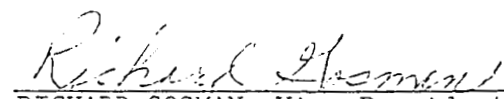

RICHARD COSMAN, Vice-President

EXHIBIT NO. 37DATE 3/15/89BILL NO. HB707

WITNESS STATEMENT

NAME Allen Martinek BUDGET _____ADDRESS Box 77 Dell, Montana 59724WHOM DO YOU REPRESENT? Water Users Irrigation CoSUPPORT _____ OPPOSE X AMEND _____

COMMENTS: There are many reasons why we are opposed to this bill. ~~My~~ We oppose it because it attempts to lease something that is not owned, just a right to use the water. Until Montana water rights have finished the adjudication process ^{and} ~~is~~ completed, these rights have not been confirmed. We feel that further studies are needed to determine the effects of in-stream flow on the agricultural users of the state.

The bill merely insures that downstream states have the free ticket to the water of Montana. The bill allows the big money of the interest of outside Montana to have control of our water. The bill gives total control of the water to the DNRC as the administrators of the law the way it interprets the law. The DNRC is the hearings officer and renders a decision on the appeals ~~in~~ affected parties. At the same time the DNRC is in the business of selling Montana water. This is a flawed process. The DNRC has very little credibility with a lot of the people of Montana and do not feel they are adequately & fairly treated by the DNRC. This bill as introduced would be not in the best interest of the irrigators of Montana.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

We cannot support a bill that is so detrimental to water right holders without ~~the~~ amending it to take the burden of proof from the water user.

DONALD R. MARBLE

Attorney at Law

SENATE AGRICULTURE

EXHIBIT NO. 38

DATE 3/15/89

BILL NO. HB 707

MARBLE LAW OFFICE

WESTLAND BUILDING

P.O. BOX 649

CHESTER, MONTANA 59522

(406) 759-5104

1-800-237-4891

March 13, 1989

Senator Tom Beck
Senate Agriculture Committee
Capitol Station
Helena, Montana 59620

Re: House Version of HB 707

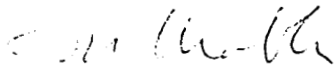
Dear Sen. Beck:

Enclosed are copies of my statement to the Committee regarding HB 707. Would you please included it in the hearing record to be made on Wednesday, March 15, 1989.

I hope to be able to attend the hearing but we are getting a lot of snow and the roads may prevent attendance.

Thanks to you and your committee for consideration and,

Very truly yours,



Donald R. Marble

Enc.

DM/ps

TO: Montana Senate Agriculture Committee

FROM: Donald R. Marble
P.O. Box 649, Chester, MT 59522
(406) 759-5104 - office
(406) 759-5211 - home

SUBJECT: Passage of House Version HB 707 to Protect Marias

INTRODUCTION

The Marias River complex is under attack by destruction of its watershed, by over-appropriation and drought. The USFS desires to increase damaging development of the fragile watershed of the Marias by burning, roading and excessive logging. The commercial water users have appropriated much of the flow. Drought makes the situation even more critical. Now protection of a minimum flow is needed and HB 707 will provide a vehicle to do this. The House Version of HB 707 deserves your support.

FACTS

The watersheds (sources) of the Marias, Milk and Teton rivers are located on natural federal lands of the north east front. A large part of these source lands are fragile and being subjected to damage from development. (See map on reverse side.)

Drought has ravaged northcentral Montana: the Teton River (lower part) was dry most of the summer of 1988; the Marias river above Tiber Dam almost dried up in 1988; in every day of August 1988, more water evaporated from the surface of Tiber Dam than flowed into Tiber Dam (according to USGS records attached).

Tiber Dam is the main recreational area in northcentral Montana. Outflow is now about 350 CFS (minimum allowable to preserve fishery below the dam), reservoir water level is very low with no promise of improvement.

Snowpack on the north East Front is now low. More and more people believe the "greenhouse effect" may be causing permanent weather changes such as we are now experiencing. (See Time magazine, "Earth Issue").

The waters flowing from these north East Front lands service the people, wildlife, fisheries and lands of northcentral Montana (See map for areas of Northcentral Montana dependant on the Marias River). These include towns, ranches, farms and recreational areas.

Cities dependent on the waters of the Marias and tributaries include Chester, Conrad, Cut Bank and all of the towns from Joplin to Havre. Many ranch-farm systems use the Marias as a water source.

COMMENTS

The Teton now goes dry whether or not there is drought. The drought makes the "dry period" longer. The Marias is next unless protection is given. Protection will have to consist better management of the watershed on federal lands, avoiding over appropriation, and some means of guarantying a minimum flow. It has always been a basic principle that clean and healthful drinking water is highest and best use. Since a vast area depends on the Marias for drinking, a minimum flow is necessary. HB 707 is a start towards providing a mechanism to guarantee a minimum flow.

Please vote for the House Version HB 707. Please vote for legislation that will protect the rivers and their sources for now and future generations.

Thank you for your consideration, and

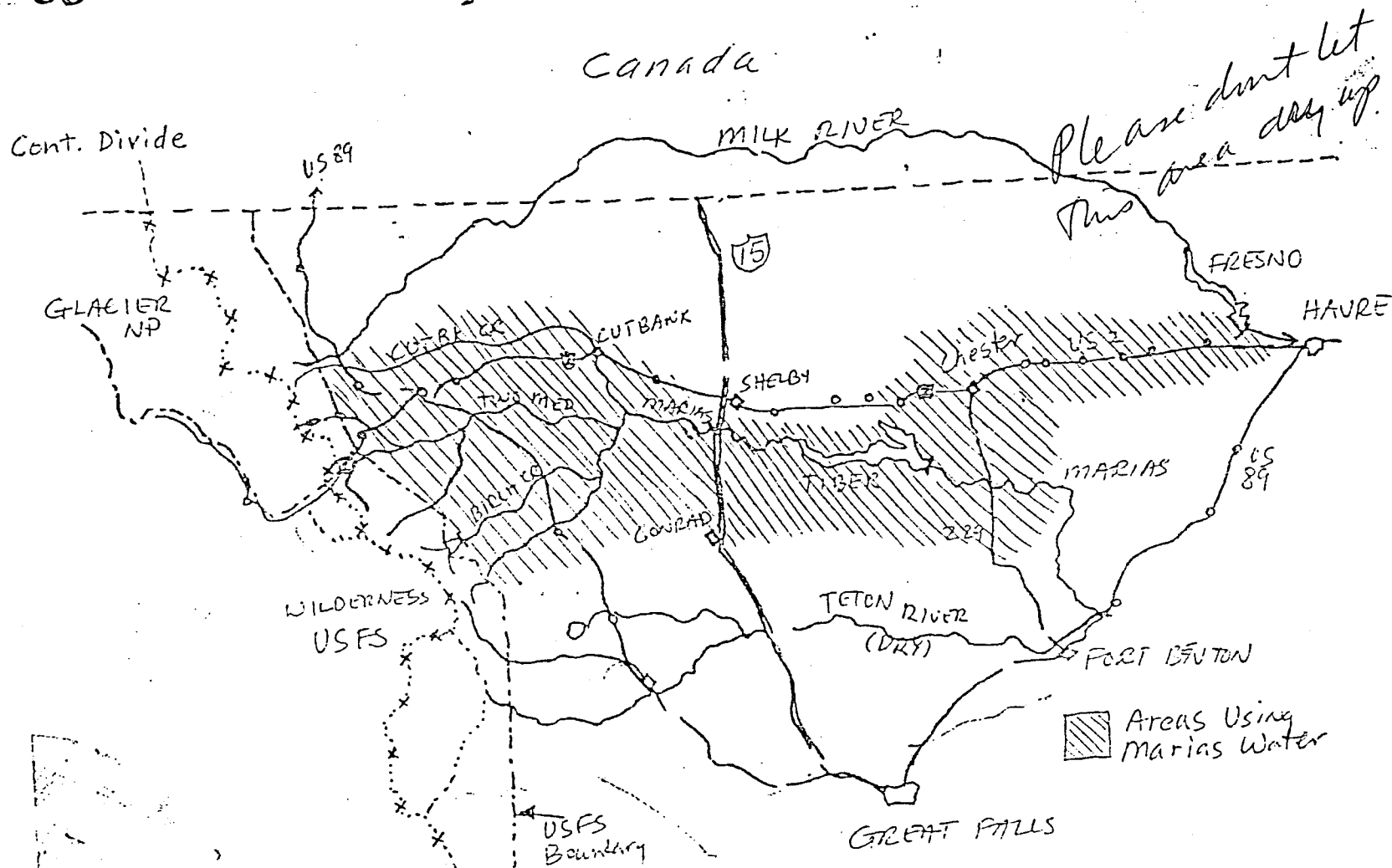


BILL NO

HB 707

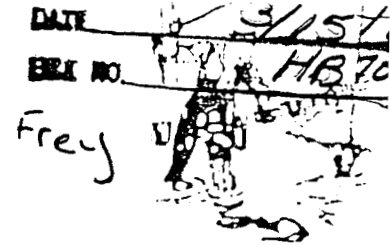
Marble

Canada





Hi-Line Sportsman's Club
P.O. BOX 393
Chester, Montana 59522



March 7, 1989

Senator Tom Beck
Senate Agriculture Committee
Montana Legislature
Capitol Station
Helena, MT 59620

Re: HB 707 - Streamflow Leasing Act

Dear Senator Tom Beck:

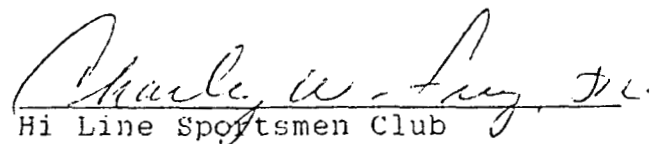
The Hi Line Sportsmen Club of Northcentral Montana would very much like your support in obtaining approval of the House version of HB 707 and other instream flow legislation. Hi Line Sportsmen is composed of approximately 160 members from northcentral Montana who live in Liberty, Hill and Cascade counties. We have been actively working for sometime to protect the Marias River-Tiber Dam-Lake Elwell complex. Last year the Upper Marias almost dried up.

We feel this instream flow bill is very important as regards:

1. Fisheries.
2. Wildlife: Dry rivers destroy our habitat.
3. Weed Control: Stable flows are needed.
4. Water Users: Ranch/Farm water systems.
5. Towns using water: Havre to Chester, for example.

This bill (HB 707) is very important to the people of Northcentral Montana. Your support will be appreciated.

We would like the letter to be part of the testimony to be read as support of HB 707.


Hi Line Sportsmen Club

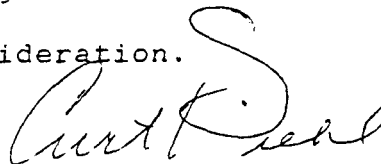
SENATE MEMORANDUM
EXHIBIT NO. 41
DATE 3/15/89
BILL NO. HB 707

March 15, 1989

My name is Curt Diehl. I farm (irrigated) in Broadwater County.

I want to state first that in-stream concerns me, as it does all Montanans. Recently, I saw thousands of inches of water run down Dry Creek, which runs through my farm. The water is lost to me as a user and to fisherman and outdoorsmen that would like to fish on Dry Creek. A better approach would be to impound the water in Dry Creek in a dam. It could then be stocked with fish, used for livestock water and irrigation.

Thank you for your consideration.

A handwritten signature in cursive script that reads "Curt Diehl". The signature is written in dark ink and is positioned above the printed name and address.

CURT DIEHL
454 Flynn Lane
Townsend, MT 59644

WITNESS STATEMENT

NAME Eugene Manley

BILL NO. HB 707

ADDRESS 15 Willow Tree Lane, Drummond, MT 59837

Granite County Commissioners

WHOM DO YOU REPRESENT? Headwaters Ag Water Committee

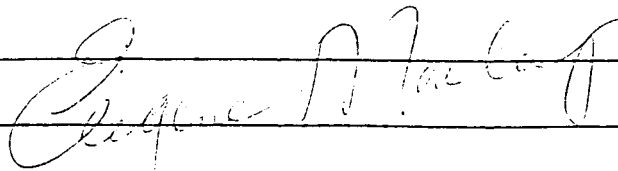
SUPPORT _____ OPPOSE unless ammended AMEND _____

COMMENTS: _____

That part of the bill permitting water leasing for recreation
should be removed. Use of water during drought periods for
floating is absolutely unthinkable.

The Department of Fish, Wildlife and Parks as lessee should pay
the cost of establishing that a water lease will not adversely
impact other existing water appropriations.

I would also suggest that the list of stream reaches submitted
to the Board of Natural Resources by the Department of Fish,
Wildlife and Parks should include the minimum amount of water
necessary to be leased for that water to achieve its objective.
The leasing of any less than that amount of water should be con-
sidered to be waste, because it then becomes an unreasonable
loss of water to that stream and its other water appropriations.



PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE ARE NO EXHIBITS # 43 OR 44 FOR THIS DAY.

EXHIBIT NO. 75
DATE 3/15/89
BILL NO. HB 707

TESTIMONY BEFORE THE
SENATE AGRICULTURE COMMITTEE

MARCH 15, 1989

Mr. Chairman, Members of the Committee, my name is Jack Salmond and I represent the Western Environmental Trade Association.

We are here today to support HB 707 because we feel that this bill is based on a reasonable premise. We share the belief of the Governor of this state that Montana needs a water plan. We must develop a sound water policy if we are going to protect the doctrine of prior appropriation.

Further, this plan should also encompass the issue of instream flows. We view HB 707 as a compromise effort to preserve the natural environmental ~~to~~ to a reasonable degree through water leasing. That goal is achieved by establishing a contractual agreement between the Department of Fish, Wildlife and Parks and existing water rights users.

However, with regard to HB 707 itself, we do see a need for this committee to consider making several improvements in the language of the bill. The following amendments ~~have or~~ will be proposed by others and WETA would like to add its support to these changes:

Page 2

1. First, the words "recreation and wildlife" should be removed. Our ability to achieve our long terms' goals would be greatly facilitated if we focus our efforts on the biological requirements of fish and aquatic life without worrying about the more broad concept of recreation. In fact, we could conceive of a situation where the two may be in direct conflict, with fish and floaters competing for the same limited resource. ~~That~~ would only impede our ability to make any progress in building a sensible water policy.

2. Second, the word "enhance" should be removed. As I'm sure most of you here today would agree, the definition of enhance is elusive at best, and our association believes allowing it to remain in the bill will cause problems down the road.

3. Finally, language should be inserted in the bill whereby the Department of Fish, Wildlife and Parks will compensate an appropriator if he has been adversely affected by this legislation. This compensation should include court costs and damages that result from the exercise of a lease. This amendment could help alleviate the fears of appropriators who might be involved in water leasing litigation.

In summary, WETA believes that HB 707 is a start in the right direction to provide the state with an instream flow plan. Such a program could prove to be a very useful tool in protecting Montana's water users from attacks by the federal government and others who want to infringe on the doctrine of prior appropriation. We recognize, however, that this does represent a big step forward and we share a number of concerns expressed by those in opposition to the bill. For that reason, we urge the committee to vote in support of HB 707 with the amendments outlined above so that we can proceed on this journey in a thoughtful and prudent manner.

Thank you for your time and ~~for your~~ consideration.

3/15/89

EXHIBITS WERE MISNUMBERED. THERE ARE NO EXHIBITS # 46, 47, 48, OR 49 FOR THIS DAY.

Statement of Richard A. Eismeyer, Bitterroot
Conservation District, Hamilton, Montana.

My name is Richard A. Eismeyer.

I was brought as a child to the Bitterroot
in 1924. With interruptions for schooling and World
War II, I have lived in ~~the~~ Western Montana ever
since. For the past 12 years I have been a supervisor
on the Bitterroot Conservation District Board of
Supervisors. Today I am here ^{today} to describe to you
our efforts to form an effective working
relationship of the Department of Fish, Game and
Parks, the Department of Natural Resources and
Conservation, the ditch companies and independent
land owners and water users, ~~and~~ with the Bitterroot
Conservation District.

Our aim was to foster a relationship that
would effectively enable these groups to work
effectively with sportsmen and conservationists,
such as those in Trout Unlimited and the
Ravalli County Fish & Wildlife Association.
Towards a common goal of preserving and
enhancing the many values of the Bitter Root
River ~~to~~ ^{for} the inhabitants of Ravalli County as
well as ~~to~~ ^{for} the many visitors who come to enjoy
the Bitter Root Valley.

By prompt and ~~impartial~~ ^{impartial} attention to 310
complaints we have gained the respect and understanding
of the community that we would impartially
protect the river and its tributaries.

(2)

from man-caused damage to the banks and bottoms of the streams, at the same time trying to help the landowners, whose living depended on these streams, solve their water problems. We invited local representatives of the U.S. Forest Service, FWS and DNRC to come to our regular meetings. Many of them did.

Slowly we earned the respect and trust of the residents to whom available running water was highly important. This included recreationists with varied interests as well as agriculturalists for whom the water was vital. We came to an important realization — the interests of trout and oxygenists were remarkably similar. They both wanted adequate and ~~the~~ reliable supplies of clean, cool water running in a river or creek with stable banks.

A series of low water years turned our attention to the potential value of the Painted Rocks in preservation of 32,000 acre feet of water on the West fork of the Bitter Root River. There was enough water there to make a real difference in the lower valley. First we tried to build a small power plant at Painted Rocks thinking that this could provide a steady and more abundant flow in the lower river as well as provide some funds for ~~the~~ river bank improvement. When this failed we encouraged & helped FWS to pump back water from Painted Rocks to enhance and steady the flow ^{of the Bitter Root} in the lake summer

This worked! On a hot and steamy night in ^{early} ~~mid~~ summer when the water level in the Bitter Root River was sinking, Jim Flynn came over to a ~~press~~ meeting attended arranged by the District and attended by both irrigators and sportsmen. There ~~was~~ was bitter resentment that FG+P had water that which they were going to hold until Fall when it would be of little value to the irrigators. Flynn suddenly offered to give ~~the irrigators~~ ^{to the irrigators} in the following ~~the~~ the FG+P water to the irrigators the water they needed if they would give it back to FG+P in the Fall when the trout needed it and the crops did not. A deal was struck. A severe problem had been solved at least temporarily. This arrangement has continued to operate very satisfactorily. A solid relationship between TU & landowners has been established. Now FG+P and DNRC, with the help of restitution funds from MPC, are completing arrangements for long term purchase of Bitter Root water which makes possible a long term solution to the water problem. There is enough enthusiasm ~~now~~ among the landowners that many of the ditch companies, as well as individual owners, ^{intend} ~~are intending~~ to buy additional water which can be used in concert with the FG+P-DNRC, to provide an even more solid solution. Everybody is winning. The BRC D is brokering ^{these} water purchases from DNRC by Bitter Root ditch companies & land owners.

DATE 3/15/89

1019

COMMITTEE ON Agriculture

VISITORS' REGISTER

VISITORS' REGISTER				
NAME	REPRESENTING	BILL #	Check One	
			Support	Oppc
Walt Zell	Hd Waters Ag Committee	707		✓
Sale Stradtman	self (Rancher)	707		✓
Francis Stradtman	self (Rancher)	707		✓
Monte Chemow	Hd Waters Ag Committee Big Hole Ranchers Ass.	707		✓
Reese Helbohn	Lincoln Irrigator	707		✓
James S. Munday	Lincoln Irrigator	707		✓
Jim Hanson	Hd. Waters Ag Committee	707		✓
Al Helbohn	" " " "	707		✓
Marvin Barber	H. P. H.	707		✓
Robert J. Waterman	MSG, & al	707		✓
Richard G. Gamm	Water Users Irrigator Co	707		✓
W. H. Gilbert Jr.	Self	707		✓
Stuart T. Hess	Water Users Irrigator Co	707		✓
Walt J. Schetter	self (Farmer)	707		✓
Kay Norenberg	WIFE	707		✓
L. M. Fowell	Bitterroot Forks Dist.	707		X
Richard A. Donshee	Bitterroot Congress District Blaine County Commissioner	707	X	✓
Eugene Maxwell	Headwaters of Water Comite	707		
Jay S. Chamberlin	B. Her Root Irrigation Dist	707		
Bill Murphy	Self	707		
Carl M. Drees	Reby River Irrigator Assn 78 Water Users Irrigator 38 Black Canyon Div. 200 Blaine County Water Comite	707 HB 707 HB 465		✓
Jimmy Jack - Mt Stockgrower	Assn. of State Grazing Districts	707		
Paul Masher	Mt. Battle Horn	707		
Frank Etchart	Grazing Irrigation Dist	707		
		707		

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo:
GEORGE OCHENSKI	A M W	707	☒	
John SALMOND	WETA	707	☒	
John Allhands	Ruby River	707		☒
Stan Bradshaw	Trout Unlimited	707	☒	
John Baring	Self	707	☒	
Larry Michnevich	Self	707	☒	
Marshall Bloom	Trout Unlimited	707	☒	
Jim Jensen	MEIC	707	☒	
KATE MAC MILLEN	Self	707	☒	
ERNO L. WESTLAKS	REP A.D. 76	707		☒
Tom SK. BOWSKI	NORTHWEST EXT MASSOUR	707	☒	
Bill Carr	Trout Unlimited	707		
John Hamilton	older mount			☒
John M. Dixon	Trout Unlimited	707	☒	
Ed Lord	MSGR	707		☒
Carl L. Sandberg	Rancher	707		
Jack Fenton	Rancher	707		
John C. Andersen	Rancher	707		
Miss Schultz	Rancher	707		
Neil Todd	Ruby River Water Users	707		☒
Joseph E. Vogt	Hamilton			
Wes Gilgore	Three Forks NIA	707		☒
Joe Stronach	Trout Unlimited	707	☒	
Walter A. Steingruber	APA	707		☒
Wilbur Andersen	Vigilante Electric Co-op	707		☒
John Skurfin	Livestock	707 465	☒	

DATE

3/15/89

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COMMITTEE ON

HB 707

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Don R Work	Self	707		✓
Norm A Stender	Self Rancher	707		✓
Ray Barnosky	Rancher	707		✓
Steve O'Hair	Just D Ranch (Cousin)	707		✓
Bill Stump	Union Ditch and self	707		✓
John Frost	Supply Ditch and self	707		✓
Wilbur Anderson	Vigilante Electric Co-op	707		✓
Blake W. Hurley	Self - Ranching	707		✓
Leo Vogt		707		2
Barbara A. Pohe	Cairbelle's / WIFE Self	707		✓
Randall P. Smith	Self	707		✓
William W. Foust	Self	707		✓
Norm P. Hargrave	Hargrave		will just attend	
Bill Dawson	Dawson Rancher Inc	707		✓
Barry D. Sanders	Self	707		✓
Tim Skender	"	707		✓
Linda Bradshaw	Self - fisherman	707	✓	
Joe McClure	Mont Farm Bureau	707		✓
Earl M. Wolfman	Self - Rancher	707		✓
Don Andrews	Greenfield Irrigation	707		✓
Chris Krumboltz	Missoula, MT	707	✓	
Kary Barclay	DNV R & C	707	✓	
John Brunner	MWR	707	✓	
Charles P. Hahn	Hahn Ranch	707		✓
James T. Hahn	Self	707		✓
		707		✓

VISITORS' REGISTER

HB 707

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
Sam De Boer	Self Manhattan			✓
Frank Fickel	Self Townsend			X
Joseph Kurland	Self - Drummond			X
John A. NELSON	SELF DRUMMOND			X
John C. Lindgren	Ruby Valley Cons. Dist.			X
Jack Fenton	SELF Sheridan			X
Kim Enkerud	MT Assoc. State Grazing Dist			X
Diana Bromley	Bitter-Root Cattle Co. Darby			X
Glenn J. Hay	Self Day Ranch			X
Marion E. Miller	Vice President Bitterroot Cattle Belles			X
John Nelson	Self Drummond Hires			X
John Fickel	Self Drummond Dist.			X
John Fickel	Self Day Ranch			X
Corvallis Grange	Corvallis Grange			X
Corvallis Grange	Self Corvallis			X
Corvallis Grange	Corvallis Grange			X
Mr. Tom Murphy	Miss Tom Murphy			X
John P. McClinton	Hamilton			X
John P. McClinton	Rancher. SOLA MT			X
John P. McClinton	Rancher, Sub., MT			X
John P. McClinton	Stevensville, MT			X
John P. McClinton	Hamilton MT			X
George C. Horak	Hamilton, MT			X
Lee Jacobson	Deer Lodge MT			X
Robert Evans	Deer Lodge, MT			X
Robert Evans	Deer Lodge, MT			X

(Please leave prepared statement with Secretary)

DATE

MARCH 15, 1989

COMMITTEE ON

AGRICULTURE

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HB 707

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Wm. Peck	PRES-S			
Bob Helbert	Helena			
John Houtchens	Stevensville, Md.			✓
Ed Newman	Stevensville, Maryland			✓
George W. Sullivan	Sp. Supply Ditch Stevensville			✓
Thomas W. Walverton	Stevensville, Md.			✓
Betty Lupton	Hamilton			✓
D. L. Linn	Bozeman			✓
Nellie S. Fadden	Maryland Fadden - Son, Inc. Manhattan, NY			✓
Clare E. Kinn	Manhattan, Md.			✓
Alex Kinn	Manhattan Md.	408000		✓
Shirley Clark	Dept of Livestock	465 dollar		✓
Russell Rasmussen	Stevensville, Md.			✓
Maurice J. Ferrat	Water right - Toston Mt.			✓
1311 Birch Creek	Water right - Toston Mt.			✓
James B. Bingham	Toston, Md.			✓
William J. Bingham	Helena, Mont.			✓
Donald M. Bingham	Hamilton, Mont.			✓
Seabell Horn Milender	Hamilton, Mont.			✓
Delores Foley	Carroll County, Maryland			✓
Gloria Hyatt	Hamilton, Md.			✓
Jennifer L. Kane	Hamilton, Md.			✓
Georgia L. Humphrey	Hamilton, Md.			✓
Marvaret West	Hamilton, Md.			✓
1311 Birch Creek	Hamilton, Md.			✓

VISITORS' REGISTER

VISITORS' REGISTER		Check One	
NAME	REPRESENTING	BILL #	Support Oppos
Wm. Stouffer		707	✓
Maynard Smith	Rancher -		✓
Wiley Duggli	Rancher	707	✓
Lena Frank	Farm Bureau	707	✓
Helen Hunter	Am. Fisheries Society Montana Chapter	707	X
Alfred Nelson	Bog room		✓
Bob Whalen	Trout Unlimited	707	✓
Bob French	Ruffatto Land & Cattle	707	✓
Francis Fella	Greenfield Irrigation	707	✓
Wick Fiske	Florence MT	707	✓
Walter J. Hunter	Whidom, Mont.	707	✓
Walter J. Hunter	Jackson MT	707	✓
Walter J. Hunter	MT Assoc. of Cons. Dist.	707	✓
Walter J. Hunter	Rancher	707	✓
Walter J. Hunter	Sierra Club	707	✓
Walter J. Hunter	see	707	X
Walter J. Hunter	(Home Born) water users organization	707	✓

(Please leave prepared statement with Secretary)

DATE

3/25

COMMITTEE ON

Agriculture

7 of 9

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bill Staudermeyer	Self Red Rock River	707		✓
Charlie Taliga	Rancher	707		✓
Michael W. Stender	Rancher	707		✓
Dennis Koenig	OUTFITTER	707	✓	
Janet Ellis	Audubon	707	2	
Tony Schreiner	Styline Friends Sports	707	✓	
Edmund Mosler	Rancher	707		✓
Allen Martindell	Water Handington Co	707		✓
Lawrence Tiller	Tieftmeyer Ditch Co	707	X	
Mark Kambeck	Rancher			✓
ack Sedgwick	DEPT. OF LIVESTOCK	HB-465	✓	
Ken Mitchell	" " "	HB 465	✓	
Jerry Nyse	Greenfield Irrigation District	707		✓
James Koenig	Greenfield Irrigation Dist.	707		✓
Harva Frank	Farm Bureau	HB 465	X	
Lorents Grosfield	Board of Natural Resources	707	X	
Glenn Marx	Governor's Office	707	✓	
Ed M. Mosier	Rancher	707		✓
Jan Koenigsberg	Self (M. A. M. U.)	707	✓	
Bill Wink	Self	707	✓	

HB 707 80/9

(Please leave prepared statement with Secretary)

DATE 1/13

COMMITTEE ON AB. 707

9 of 9

VISITORS' REGISTER

[illegible]

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on March 20, 1989, at
1:00 P.M.

ROLL CALL

Members Present: Senator Hubert Abrams, Senator Gary
Aklestad, Senator Esther Bengtson, Senator Gerry
Devlin, Senator Jack Galt, Senator Greg Jergeson,
Senator Gene Thayer, Senator Bob Williams, Chairman Tom
Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

DISPOSITION OF HOUSE BILL 707

Discussion: Chairman Beck stated at the last meeting, the
committee discussed the Milk River amendments.

Doug Sternberg indicated that the committee adopted the
third amendment. "I don't believe that we discussed
one or two (amendments). Those are the amendments
dated March 15."

Senator Jergeson - "I didn't offer them because of the cost
to get them into the Milk River. Then, you start on
the Clark Fork and Yellowstone, Musselshell, and Milk,
Little Missouri, Teton, and the Missouri. All we have
left is the Bitterroot and the Flathead."

Chairman Beck - "Do you think that there is a real problem,
Greg, with the status of the Milk River as it is right
now?"

Senator Jergeson - "The amendments that limit it to the
fishery should not affect it."

Chairman Beck - "I guess if there is no motion to put these
two into the bill...we will not put them in...The next

proposed amendments are the Grosfield amendments."

Lorents Grosfield - "The amendment was adopted before the Galt amendments were put in. It was an alternative to Galt's amendments...We are fighting an administrative remedy, that doesn't cost the affecter anything. In other words, he can go to the Department of Natural Resources and say, 'Hey I think that there is going to be a problem there and I want to object to this lease because of that. Then, the Department of Natural Resources will determine the good possibility that he might be right. Then, they use their attorneys to go in and look at the situation. Next, they make a determination of whether or not the guy has a point. If they think that the guy may have a point, then they go to the fish and game. All this is done at no expense to the objector. All he has to do, is walk in the door of the department and make his complaint. Now, there is nothing in there that concludes this objector from going to the District Court and ask for an immediate relief, pending the departments determination...The idea of this is to get away from the expense to the objector and that is really what this is after. Then you get into the second one that talks about attorneys fees and so on."

Senator Galt - "Without any of these bills or laws, there is always a place for an objective to go to the water departments. Nobody is going to keep you from walking into the Department of Natural Resources and saying that there is something wrong with this lease...The other thing, that these amendments are doing is the other day, we adopted amendments that changed Commission for Fish and Game and the Board of Natural Resources and responsible bodies in this thing. This bill sticks it right back into the Department of Fish and Game and the Department of Natural Resources. The Democrats are going to be making all the decisions on this thing. I still think that the commission and the Board of Natural Resources should be doing it. As far as giving an objector an arena to object, that's open right now."

Senator Bengtson - "I have been looking at the amendments that we adopted on Friday and the Grosfield amendments, and they are all addressing the same thing such as settling these disputes and who is going to pay for it. I don't think we need the language in the bill to tell us--it's the same thing."

Senator Williams - "The Thoft amendment was put together on March 16. Maybe you would want to address how the

amendment you accepted Friday would affect (the Thoft amendments).

Representative Thoft - "There is additional language at the end of the amendment. This language says 'the objector and the Department would get together and negotiate a settlement. The attorney fees would be at cost of the objector as long as it is a negotiated settlement.'"

Senator Galt - "Don't you think they have that arena now?"

Representative Thoft - "They probably do. I wouldn't disagree with that Senator Galt. I guess what I'm suggesting is to make that language clearer."

Chairman Beck indicated that no one moved the Grosfield amendments nor the Thoft amendments.

Senator Aklestad - "You indicated there is enough language already on the books to take care of an individual before you get to the attorneys fees. Would you be able to give somebody a call or make a demand on somebody and say you are adversely affecting my water right? If so where?"

Senator Galt - "I think that is in the power of Natural Resources. I think it just takes a phone call as it does with the water judge. All you have to do is call the water judge."

Chairman Beck - "Let's make sure that this is clear. The leasing of water has to be by the owner with an appropriated right. There is no chance that somebody can lease a water right and turn around and sub-lease it to the Fish and Game Department."

Senator Galt - "I believe that any dealings with the fish and game on this would have to deal with the owner."

Chairman Beck - "The fish and game owns a great deal of water, plus municipalities stating that they have to lease that water from private individuals...What I am saying is, I don't want to see local government use it as a revenue source for them. I also know that the fish and game is buying more and more land all the time. Along with the land comes water rights...Maybe there is some validity in saying that in order for them to lease for themselves, they have to lease from one of the members of the stream and one of the private adjudicators of that stream."

Senator Jergeson - "If you read that entire paragraph it

would then say, 'the board may declare stream region eligible for leaking proceeding to section 4 only to find that water leaking is necessary provided that the fish and game provide for fisheries during critical low periods. That existing water rights in the stream region are not held by the state or municipalities.' There is no stream, in the state of Montana, that does not have water rights held by the state. You are flat out eliminating nearly every stream in the state of Montana with this amendment. I know what you are trying to do. You may have killed the whole bill."

Chairman Beck - "I am not trying to pull any hanky-panky."

Doug Sternberg explains the Beck amendments. See exhibit 4. "It seems to me that this kind of determination should be made before or during the process of the actual designation of the stream reach, rather than somewhere down farther in the process. It seemed to be crucial enough in the designation process that it should be included somewhere in that section (section 5)."

Senator Galt - "There might be another problem with the amendment. The Fish and Game Department, I believe, is leaking water from the Department of Natural Resources."

Senator Bengtson - "Mr. Chairman, perhaps it is really taking a lot of flexibility out of this and I think rather than do that, wait another year. They are not going to do anything until 1991."

Chairman Beck - "It is not a big deal. I just want you to be aware of what could happen to the bill."

Senator Devlin - "Is there anything to prohibit the department to sub-lease to another private group entity or anything after they lease this water. Can they sub-lease it?"

Senator Galt - "I don't think they can. I'll go back to the original amendment and that is anyone who leases his water has to lease it from a water right owner. I think if they did, they would be run out of town."

Doug Sternberg - "It would be apparent to me, that the language we adopted in the Gray Bill, does limit the use of the leased water. This is the water that would be provided for fisheries."

Senator Galt - "Somewhere in the bill, I believe that it discusses that the fish and game is the only one that can enter into that."

Doug Sternberg - "The internal reference in sub-section 4 is to sub-section 1 (b) which is on page 11, on lines 25 through 27. What it allows the department to do, is to accept contributions from public or private entities for the purpose of developing storage facilities to provide stream flows. If the department receives a contribution from a public or private entity, specifically for the purpose of developing storage facilities to provide stream flow,s sub-section 4 allows the department to spend that contribution...Really, sub-section 1 (b) is limited by the kind of contribution that the department may accept. Therefore, if the department is granted a contribution for purpose of developing storage facilities, sub-section 4 simply allows them to spend the money. Those two sub-sections work together."

Senator Galt - "If the interest is in storage facilities for any reason, you either have to list all other reasons or list none of the reasons. But, if you list just one reason for fisheries, that is exclusive of somebody accepting the money if somebody were to donate the money for something that was for wildlife or recreating storage facility."

Senator Bengtson - "I agree with that because the bill was actually addressing instream flow for a fishery leasing for instream flow. Now, this is a different subject, when you are providing contributions for storage and off-stream storage."

Senator Devlin - "If you say the off-stream storage is in use for fisheries, is that all it could ever be used for?"

Chairman Beck - "If it's fisheries, then that is all it could be used for."

Representative Iverson - "I don't think it matters that much because, if you want to be practical about this. We all know what water development costs and what it costs to build dams and storage. Nobody is going to contribute money that is going to build anything large enough to be sued as a storage unit."

Senator Aklestad - "On page 11, line 24, we will leave fisheries in there because it is a lease... The amendments that have been amended into the bill so far, do you agree with the amendments? If not, which ones don't you agree with?"

Ron Waterman - "I would like to go ahead and make a general

comment as far as us getting involved in the leasing arena. We should try to make every effort to resolve any concerns. Once we start getting involved with going to court, I guess if there are various aspects of the bill that make it more and more difficult for anyone to get involved in leasing I have a problem with that because I think if you are going to make it so complex that nobody is going to want to touch it because of the negative symbols."

Senator Aklestad - "Your impression is that the amendments that we have put on so far, would make the bill too cumbersome to actually lease water or (for a person) having any incentive to lease water. Is that right?"

Ron Waterman - "We probably don't know until we try it. But, I suggest that it makes anyone who is going to lease water very concerned."

Senator Aklestad - "I have a question for Senator Galt. There is no doubt that this bill will go to a conference or a free conference committee."

Senator Galt - "You should ask the sponsor of the bill, Representative Iverson. He would know better than I. I don't know right now."

Representative Iverson - "I really can't speak for the House entirely, but there are a few things that I am concerned about. I don't think that the bill is strapped by any means...The one thing I would mention is, I am concerned about the way the attorney fees have been addressed...I am a little concerned not with the wording attorneys fees, but probably the wording at the administrative level. I think that has some pretty serious implications."

Senator Aklestad - "Senator Galt, would it be your intention to try and keep all of the amendments on the bill except for technical changes or a free conference committee?"

Senator Galt - "As you well know Senator, you get to one of those free conference committees and that is where you trade. I wouldn't say that any of these (amendments) are written in stone."

Senator Aklestad - "I hate to put you on the spot, Mr. President...You have the power to dictate that conference committee by the make up of the conference, because it takes two on each side of each conference committee to come to a conclusion. That is why I am

asking those questions. I am trying to derive whether it is possible for me to vote for the bill at all because if there is any of this stuff taken off--it is tough to vote for it probably with it on...It doesn't really matter what happens in a conference committee or pre-conference committee. If it comes down to amendatory veto and then you try and offset that with the two bodies...I am wondering if this committee realizes that this possibly the last spot we will have a real grip on this bill. We should get an indication from the administration what their thoughts are on the amendments that we have put on."

Senator Galt - "I don't think that anyone in the room including Mr. Marks, could talk about what the Governor will do. He's not going to know until he gets the bill in front of him. Then Mr. Marks may be able to advise him."

Senator Bengtson - "Mr. Chairman, I resist that question too. This is the legislative branch. We are dealing with a bill that we are putting our stamp on. We can't anticipate what the Governor is going to do."

Chairman Beck - "I am sure that we are quite familiar that he is not going to be happy with the amendments."

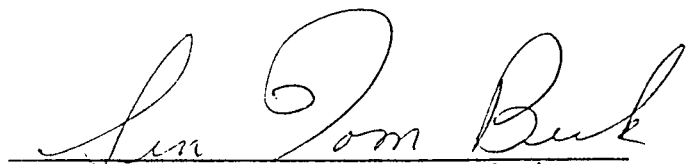
Senator Jergeson - "I have a concern about the whole direction of this conversation trying to get a commitment out of our president...We should exercise our best judgment here."

Amendments and Votes: None

Recommendation and Vote: Senator Bengtson moved HB 707 BE CONCURRED IN AS AMENDED. The motion carried with Senator Thayer, Senator Galt, Senator Bengtson, Senator Jergeson, and Senator Williams voting yes. Senator Beck, Senator Abrams, Senator Aklestad, Senator Devlin voting no.

ADJOURNMENT

Adjournment At: 2:33 P.M.


TOM BECK, Chairman

TB/jj

ROLL CALL

AGRICULTURE COMMITTEE

DATE 3/20

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	/		
SENATOR GARY AKLESTAD	/		
SENATOR ESTHER BENGTON	/		
SENATOR GERRY DEVLIN	/		
SENATOR JACK GALT	/		
SENATOR GREG JERGSON	/		
SENATOR GENE THAYER	/		
SENATOR BOB WILLIAMS	/		
SENATOR TOM BECK	/		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

page 1 of 6
March 21, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration HB 707 (third reading copy -- blue), respectfully report that HB 707 be amended and as so amended be concurred in:

Sponsor: Iverson ()

1. Title, lines 8 and 9.

Following: "PURPOSE OF"

Strike: "ENHANCING OR MAINTAINING"

Insert: "PROVIDING"

2. Title, line 9.

Following: "FOR"

Strike: remainder of line 9

Insert: "THE BENEFIT OF FISHERIES"

3. Title, line 17.

Strike: "DEPARTMENT"

Insert: "BOARD"

4. Page 2, line 2.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

5. Page 2, line 3.

Following: line 2

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

6. Page 2, lines 6 and 7.

Strike: "enhance" on line 6 through "recreation" on line 7

Insert: "provide for fisheries"

7. Page 2, line 9.

Following: "parks"

Insert: "that have the approval of the fish and game commission"

8. Page 3, line 4.

Following: "conservation"

Strike: "will"

Insert: "; with the consent of the board, shall"

9. Page 3, lines 23 and 24.

Following: "authorization" on line 23

Strike: remainder of line 23 through "contract" on line 24

10. Page 4, line 2.

Following: "conservation"

Strike: "should"

Insert: ", with the consent of the board, shall"

11. Page 4, line 5.

Following: "are not"

Strike: "or probably will not be"

12. Page 5, line 17.

Following: line 16

Insert: "(6) "Commission" means the fish and game commission
provided for in 2-15-3402."

Re-number: subsequent subsections

13. Page 14, line 13.

Following: "to"

Strike: "enhance or maintain"

Insert: "provide"

14. Page 14, line 14.

Following: "for"

Strike: "fish, wildlife, or recreation"

Insert: "benefit of fisheries"

15. Page 14, line 16.

Following: "parks"

Insert: ", with the consent of the commission, "

16. Page 14, lines 17 and 18.

Following: "of" on line 17

Strike: "maintaining or enhancing"

Insert: "providing"

Following: "for" on line 17

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

17. Page 14, line 22.

Following: "department"

Insert: ", with the consent of the board,"

18. Page 14, line 23.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

19. Page 14, line 24.

Following: "for"

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

20. Page 15, lines 5 and 6.

Following: "streamflow" on line 5

Strike: "will" through "enhanced" on line 6

Insert: "must be provided"

Following: "must" on line 6

Strike: "provide"

Insert: "include"

21. Page 15, line 8.

Strike: "will"

Insert: "must"

22. Page 15, line 12.

Strike: "lessor"

Insert: "lessor's crop, if applicable, and excluding water used as recharge or return flow"

23. Page 15, line 14.

Following: line 13

Strike: "enhance or maintain"

Insert: "provide"

24. Page 15, line 21.

Following: line 20

Insert: "(5) The department of fish, wildlife, and parks has the responsibility to prove to the board under 85-2-402 that a proposed lease authorization does not adversely affect existing water rights. The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."

Renumber: subsequent subsections

25. Page 16, line 4.

Strike: "(9)"

Insert: "(10)"

26. Page 16, line 6.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

27. Page 16, line 8.

Following: "department"

Insert: ", with the consent of the board,"

28. Page 16, line 10.

Strike: "(9)"

Insert: "(10)"

Following: "by"

Strike: "substantial credible"

Insert: "a preponderance of the"

29. Page 16, line 11.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

30. Page 17, line 5.

Following: "parks,"

Strike: "in consultation with the department"

Insert: "with the consent of the commission"

31. Page 17, line 7.

Following: "to"

Strike: "maintain or enhance"

Insert: "provide"

32. Page 17, line 12.

Following: line 11

Strike: "maintain" through "recreation"

Insert: "provide for fisheries"

33. Page 17, line 14.

Insert: "(3) Upon declaring a stream reach eligible for leasing, the board shall request the department to prepare an analysis concerning whether longer term solutions to the critical low flows in the stream reach are feasible. Longer term solutions to be considered include storage enhancement or development and recharge from ground water sources. The preparation of or recommendations resulting from the analysis may not preclude, inhibit, or delay the negotiation or implementation of leases on the stream reach as provided in [section 4]."

Renumber: subsequent subsection

34. Page 17, lines 21 through 23.

Following: "to" on line 21

Strike: "maintain" on line 21 through "enhance" on line 22

Insert: "provide"

Following: "for" on line 22

Strike: remainder of line 22 through "purposes" on line 23

Insert: "the benefit of fisheries"

35. Page 17, line 24 through page 18, line 1.

Following: "TO" on line 24

Strike: remainder of line 24 through "ENHANCE" on line 25

Insert: "provide"

Following: "STREAMFLOWS" on line 25

Strike: remainder of line 25 through "PURPOSES" page 18, line 1

36. Page 18, line 8.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

37. Page 18, line 9.

Following: "flows"

Strike: "for" through "recreation"

38. Page 18, lines 14 and 15.

Following: "TO" on line 14

Strike: "MAINTAIN OR ENHANCE"

Insert: "provide"

Following: "STREAMFLOWS" on line 14

Strike: remainder of line 14 through "PURPOSES" on line 15

39. Page 18, line 19.

Strike: "DEPARTMENT" in two places

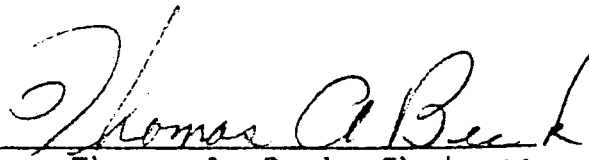
Insert: "board"

40. Page 19, line 2.
Following: "4"
Strike: "and"
Insert: ", "
Following: "5"
Insert: ", and 7"

41. Page 19, line 5.
Following: "4"
Strike: "and"
Insert: ", "
Following: "5"
Insert: ", and 7"

AND AS AMENDED BE CONCURRED IN

Signed: _____


Thomas A. Beck, Chairman

B-21
8/1

Gray House Bill No. 707 -- Unofficial
March 17, 1989

EXHIBIT NO. 1
DATE 3/20
BILL NO. HB 707

1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ~~ENHANCING OR~~
3 ~~MAINTAINING~~ PROVIDING STREAMFLOWS FOR FISH, ~~WILDLIFE, OR~~
4 ~~RECREATION~~ THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES ~~OR FOR DEVELOPING~~
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

14
15
16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish;
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.

25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation ~~will~~ WITH THE
8 CONSENT OF THE BOARD, SHALL review the proposed leases for a single
9 stream reach in one proceeding, though the potential for another set of lease
10 applications at a future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.
30

31 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

32 Section 1. Section 85-2-102, MCA, is amended to read:

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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1 (1) "Appropriate" means to:

2 (a) divert, impound, or withdraw (including by stock for stock water) a
3 quantity of water; or

4 (b) in the case of a public agency, to reserve water in accordance with 85-
5 2-316; or

6 (c) in the case of the department of fish, wildlife, and parks, to lease water
7 in accordance with [section 4].

8 (2) "Beneficial use", unless otherwise provided, means:

9 (a) a use of water for the benefit of the appropriator, other persons, or the
10 public, including but not limited to agricultural (including stock water), domestic,
11 fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational
12 uses; and

13 (b) a use of water appropriated by the department for the state water
14 leasing program under 85-2-141 and of water leased under a valid lease issued
15 by the department under 85-2-141; AND

16 (C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND
17 PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

18 (3) "Board" means the board of natural resources and conservation
19 provided for in 2-15-3302.

20 (4) "Certificate" means a certificate of water right issued by the department.

21 (5) "Change in appropriation right" means a change in the place of
22 diversion, the place of use, the purpose of use, or the place of storage.

23 (6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED
24 FOR IN 2-15-3402.

25 ~~(6)~~(7) "Declaration" means the declaration of an existing right filed with the
26 department under section 8, Chapter 452, Laws of 1973.

27 ~~(7)~~(8) "Department" means the department of natural resources and
28 conservation provided for in Title 2, chapter 15, part 33.

29 ~~(8)~~(9) "Existing right" means a right to the use of water which would be
30 protected under the law as it existed prior to July 1, 1973.

31 ~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath
32 the bed of a stream, lake, reservoir, or other body of surface water, and which
33 is not a part of that surface water.

34 ~~(10)~~(11) "Permit" means the permit to appropriate issued by the department

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1 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

15 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

16 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

17 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter
18 7.

19 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
20 however made, by which groundwater is sought or can be obtained or through
21 which it flows under natural pressures or is artificially withdrawn."

22 Section 2. Section 85-2-402, MCA, is amended to read:

23 "85-2-402. Changes in appropriation rights. (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

26 (2) Except as provided in subsections (3) through (5), the department shall
27 approve a change in appropriation right if the appropriator proves by substantial
28 credible evidence that the following criteria are met:

29 (a) The proposed use will not adversely affect the water rights of other
30 persons or other planned uses or developments for which a permit has been
31 issued or for which water has been reserved.

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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1 (c) The proposed use of water is a beneficial use.

2 (3) The department may not approve a change in purpose of use or place
3 of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5
4 or more cubic feet per second of water unless the appropriator proves by
5 substantial credible evidence that:

6 (a) the criteria in subsection (2) are met;

7 (b) the proposed change is a reasonable use. A finding of reasonable use
8 must be based on a consideration of:

9 (i) the existing demands on the state water supply, as well as projected
10 demands of water for future beneficial purposes, including municipal water
11 supplies, irrigation systems, and minimum streamflows for the protection of
12 existing water rights and aquatic life;

13 (ii) the benefits to the applicant and the state;

14 (iii) the effects on the quantity and quality of water for existing uses in the
15 source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for
17 which application has been made;

18 (v) the effects on private property rights by any creation of or contribution to
19 saline seep; and

20 (vi) the probable significant adverse environmental impacts of the proposed
21 use of water as determined by the department pursuant to Title 75, chapter 1,
22 or Title 75, chapter 20.

23 (4) The department may not approve a change in purpose of use or place
24 of use for a diversion that results in 4,000 or more acre-feet of water a year
25 and 5.5 or more cubic feet per second of water being consumed unless:

26 (a) the applicant proves by clear and convincing evidence and the
27 department finds that the criteria in subsections (2) and (3) are met; and

28 (b) the department then petitions the legislature and the legislature affirms
29 the decision of the department after one or more public hearings.

30 (5) (a) The state of Montana has long recognized the importance of
31 conserving its public waters and the necessity to maintain adequate water
32 supplies for the state's water requirements, including requirements for reserved
33 water rights held by the United States for federal reserved lands and in trust for
34 the various Indian tribes within the state's boundaries. Although the state of

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1 Montana also recognizes that, under appropriate conditions, the out-of-state
2 transportation and use of its public waters are not in conflict with the public
3 welfare of its citizens or the conservation of its waters, the following criteria must
4 be met before out-of-state use may occur:

5 (b) The department and, if applicable, the legislature may not approve a
6 change in appropriation right for the withdrawal and transportation of appropriated
7 water for use outside the state unless the appropriator proves by clear and
8 convincing evidence and, if applicable, the legislature approves after one or
9 more public hearings that:

10 (i) depending on the volume of water diverted or consumed, the applicable
11 criteria and procedures of subsection (2) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water
13 conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
15 public welfare of the citizens of Montana.

16 (c) In determining whether the appropriator has proved by clear and
17 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
18 will be met, the department and, if applicable, the legislature shall consider the
19 following factors:

20 (i) whether there are present or projected water shortages within the state of
21 Montana;

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

27 (iv) the demands placed on the applicant's supply in the state where the
28 applicant intends to use the water.

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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1 the department shall give notice of the proposed change in accordance with 85-
2 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
3 its approval or denial of the proposed change. The department shall provide
4 notice and may hold one or more hearings upon any other proposed change if
5 it determines that ~~such~~ a change might adversely affect the rights of other
6 persons.

7 (7) The department or the legislature, if applicable, may approve a change
8 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
9 necessary to satisfy the criteria of this section, including limitations on the time
10 for completion of the change. The department may extend time limits specified
11 in the change approval under the applicable criteria and procedures of 85-2-
12 312(3).

13 (8) If a change is not completed as approved by the department or
14 legislature or if the terms, conditions, restrictions, and limitations of the change
15 approval are not complied with, the department may, after notice and opportunity
16 for hearing, require the appropriator to show cause why the change approval
17 should not be modified or revoked. If the appropriator fails to show sufficient
18 cause, the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the department must be
20 sent to the applicant, and a duplicate must be kept in the office of the
21 department in Helena.

22 (10) A person holding an issued permit or change approval that has not
23 been perfected may change the place of diversion, place of use, purpose of
24 use, or place of storage by filing an application for change pursuant to this
25 section.

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 ~~deemed~~ considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. Leases to ~~enhance or maintain~~ PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES --
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks , WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department , WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for ~~fish, wildlife, or recreation~~ THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must ~~provide~~ INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the ~~lessor~~ LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 (5)(6) The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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1 appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects
2 to his rights that has not been considered previously. IF AN APPROPRIATOR
3 PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF
4 FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN
5 AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF
6 ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
7 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
8 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS
9 SECTION.

10 ~~(6)~~(7) During the term of the original lease, the department, WITH THE
11 CONSENT OF THE BOARD, may modify or revoke the lease authorization if an
12 appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves
13 by ~~substantial credible~~ A PREPONDERANCE OF THE evidence that his water
14 right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS
15 TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
16 SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES
17 THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF
18 PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY
19 FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER
20 LEASES ENTERED INTO UNDER THIS SECTION.

21 ~~(7)~~(8) The priority of appropriation for a lease under this section is the
22 same as the priority of appropriation of the right that is leased.

23 ~~(8)~~(9) Neither a change in appropriation right nor any other authorization is
24 required for the reversion of the appropriation right to the lessor's previous use.

25 ~~(9)~~(10) A person issued a water use permit with a priority of appropriation
26 after the date of filing of an application for a lease authorization under this
27 section may not object to the exercise of the lease according to its terms, the
28 renewal of the lease, or the reversion of the appropriation right to the lessor
29 according to the lessor's previous use.

30 ~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY
31 ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR
32 PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE
33 MEASURING PLAN SUBMITTED UNDER THIS SECTION.

34 NEW SECTION. Section 5. Board designation of eligible stream reaches.

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(1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
WITH THE CONSENT OF THE COMMISSION, may apply to the board for
designation of stream reaches for which water leasing to ~~maintain or enhance~~
PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to
[section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
FLows IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

~~(3)(4)~~ The board may designate no more than 10 stream reaches in the
state where water leasing pursuant to [section 4] may occur.

NEW SECTION. Section 6. Contributions for leasing appropriation rights
OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
contributions from public or private entities for the purpose of:

(A) leasing appropriation rights to ~~maintain or enhance~~ PROVIDE instream
flows for fish, wildlife, ~~or recreation purposes~~ THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
PURPOSES.

(2) Any contributions accepted by the department under this section must be
deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under ~~this section~~
SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
~~enhancing~~ PROVIDING instream flows for fish, wildlife, ~~or recreation~~ UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

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1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-
25

Amendments to House Bill No. 707
Third Reading Copy

EXHIBIT NO. 2
DATE 3/20/89
BILL NO. HB 707

For the Committee on Senate Agriculture
(Grossfield Amendments)

Prepared by Doug Sternberg, Committee Staff
March 16, 1989

1. Page 16, line 7.

Following: "(6)"

Strike: the remainder of line 7 through "affected." on line 11

Insert: "If during the term of a lease or a renewal of a lease under subsection (5) the water right of an appropriator, other than an appropriator described in subsection (9), is adversely affected by the exercise of the lease, the appropriator may file a complaint with or submit new evidence to the department as provided in subsection (5). Upon receipt of a complaint or new evidence under subsection (5), the department shall investigate the allegations contained in the complaint or new evidence. If as a result of the investigation the department determines that the terms of the lease are not being followed or that exercise of the lease is creating an adverse effect, the department shall, after notice, require the department of fish, wildlife, and parks to show cause why the lease should not be modified or revoked. If the department of fish, wildlife, and parks fails to show sufficient cause, the department shall modify or revoke the lease."

2. Page 18, line 18.

Following: line 17

Insert: "NEW SECTION. Section 7. Recovery of attorney fees. If a final decision of the department to lease, renew a lease, or modify or revoke a lease pursuant to [section 4] is appealed to district court, the court shall, in addition to damages resulting from the exercise of a lease that has caused adverse effect to a water right, award reasonable attorney fees and court costs to the adversely affected party if he prevails in the appeal, unless the court finds that the position of the department of fish, wildlife, and parks was substantially justified or that special circumstances make an award of attorney fees and court costs unjust."

Renumber: subsequent sections

3. Page 19, lines 2 and 5.

Following: "4"

Strike: "and"

Insert: ",",

Following: "5"

Insert: ", and 7"

Amendments to House Bill No. 707
Third Reading Copy

DATE 3/20/89
BILL NO. HB 707

Requested by Rep. Thoft
For the Committee on Senate Agriculture

Prepared by Deborah Schmidt
March 16, 1989

1. Page 16, 11.
Following "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease, and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section. However, nothing in this subsection precludes the negotiation of a reasonable settlement for damages between the department of fish, wildlife, and parks and an appropriator whose water rights may be adversely affected by the exercise of the lease."

S:cc

SENATE AGRICULTURE

EXHIBIT NO. 4

DATE 3/20/89

BILL NO. HB 707

Amendments to House Bill No. 707
Third Reading Copy

Requested by Senator Beck
For the Committee on Senate Agriculture

Prepared by Doug Sternberg, Committee Staff
March 20, 1989

1. Page 17, line 13.

Following: "PERIODS"

Insert: "and that existing water rights in the stream reach
are not held by the state or a municipality"

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EXHIBIT NO. 5
DATE 3/20/89
BILL NO. HB 707

1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ~~ENHANCING OR~~
3 ~~MAINTAINING~~ PROVIDING STREAMFLOWS FOR FISH, WILDLIFE, OR
4 ~~RECREATION~~ THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR DEVELOPING
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

14
15
16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish,
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.

25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation ~~will~~ WITH THE CONSENT
8 OF THE BOARD, SHALL review the proposed leases for a single stream reach
9 in one proceeding, though the potential for another set of lease applications at a
10 future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.
30

31 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

32 Section 1. Section 85-2-102, MCA, is amended to read:

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water; ~~or,~~

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 4].

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; ~~and~~

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; AND

(C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(6)~~(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(7)~~(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department

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1 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

15 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

16 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

17 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter
18 7.

19 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
20 however made, by which groundwater is sought or can be obtained or through
21 which it flows under natural pressures or is artificially withdrawn."

22 Section 2. Section 85-2-402, MCA, is amended to read:

23 "85-2-402. Changes in appropriation rights. (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

26 (2) Except as provided in subsections (3) through (5), the department shall
27 approve a change in appropriation right if the appropriator proves by substantial
28 credible evidence that the following criteria are met:

29 (a) The proposed use will not adversely affect the water rights of other
30 persons or other planned uses or developments for which a permit has been
31 issued or for which water has been reserved.

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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1 (c) The proposed use of water is a beneficial use.

2 (3) The department may not approve a change in purpose of use or place
3 of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5
4 or more cubic feet per second of water unless the appropriator proves by
5 substantial credible evidence that:

6 (a) the criteria in subsection (2) are met;

7 (b) the proposed change is a reasonable use. A finding of reasonable use
8 must be based on a consideration of:

9 (i) the existing demands on the state water supply, as well as projected
10 demands of water for future beneficial purposes, including municipal water
11 supplies, irrigation systems, and minimum streamflows for the protection of
12 existing water rights and aquatic life;

13 (ii) the benefits to the applicant and the state;

14 (iii) the effects on the quantity and quality of water for existing uses in the
15 source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for
17 which application has been made;

18 (v) the effects on private property rights by any creation of or contribution to
19 saline seep; and

20 (vi) the probable significant adverse environmental impacts of the proposed
21 use of water as determined by the department pursuant to Title 75, chapter 1,
22 or Title 75, chapter 20.

23 (4) The department may not approve a change in purpose of use or place
24 of use for a diversion that results in 4,000 or more acre-feet of water a year
25 and 5.5 or more cubic feet per second of water being consumed unless:

26 (a) the applicant proves by clear and convincing evidence and the
27 department finds that the criteria in subsections (2) and (3) are met; and

28 (b) the department then petitions the legislature and the legislature affirms
29 the decision of the department after one or more public hearings.

30 (5) (a) The state of Montana has long recognized the importance of
31 conserving its public waters and the necessity to maintain adequate water
32 supplies for the state's water requirements, including requirements for reserved
33 water rights held by the United States for federal reserved lands and in trust for
34 the various Indian tribes within the state's boundaries. Although the state of

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1 Montana also recognizes that, under appropriate conditions, the out-of-state
2 transportation and use of its public waters are not in conflict with the public
3 welfare of its citizens or the conservation of its waters, the following criteria must
4 be met before out-of-state use may occur:

5 (b) The department and, if applicable, the legislature may not approve a
6 change in appropriation right for the withdrawal and transportation of appropriated
7 water for use outside the state unless the appropriator proves by clear and
8 convincing evidence and, if applicable, the legislature approves after one or
9 more public hearings that:

10 (i) depending on the volume of water diverted or consumed, the applicable
11 criteria and procedures of subsection (2) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water
13 conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
15 public welfare of the citizens of Montana.

16 (c) In determining whether the appropriator has proved by clear and
17 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
18 will be met, the department and, if applicable, the legislature shall consider the
19 following factors:

20 (i) whether there are present or projected water shortages within the state of
21 Montana;

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

27 (iv) the demands placed on the applicant's supply in the state where the
28 applicant intends to use the water.

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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1 the department shall give notice of the proposed change in accordance with 85-
2 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
3 its approval or denial of the proposed change. The department shall provide
4 notice and may hold one or more hearings upon any other proposed change if
5 it determines that ~~such~~ a change might adversely affect the rights of other
6 persons.

7 (7) The department or the legislature, if applicable, may approve a change
8 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
9 necessary to satisfy the criteria of this section, including limitations on the time
10 for completion of the change. The department may extend time limits specified
11 in the change approval under the applicable criteria and procedures of 85-2-
12 312(3).

13 (8) If a change is not completed as approved by the department or
14 legislature or if the terms, conditions, restrictions, and limitations of the change
15 approval are not complied with, the department may, after notice and opportunity
16 for hearing, require the appropriator to show cause why the change approval
17 should not be modified or revoked. If the appropriator fails to show sufficient
18 cause, the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the department must be
20 sent to the applicant, and a duplicate must be kept in the office of the
21 department in Helena.

22 (10) A person holding an issued permit or change approval that has not
23 been perfected may change the place of diversion, place of use, purpose of
24 use, or place of storage by filing an application for change pursuant to this
25 section.

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 ~~deemed~~ considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. Leases to ~~enhance or maintain~~ PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES -
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks, WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department, WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for fish, ~~wildlife, or recreation~~ THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must ~~provide~~ INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the ~~lessor~~ LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 (5)(6) The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects to his rights that has not been considered previously. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS SECTION.

~~(6)~~(7) During the term of the original lease, the department, WITH THE CONSENT OF THE BOARD, may modify or revoke the lease authorization if an appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves by ~~substantial credible~~ A PREPONDERANCE OF THE evidence that his water right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS SECTION.

~~(7)~~(8) The priority of appropriation for a lease under this section is the same as the priority of appropriation of the right that is leased.

~~(8)~~(9) Neither a change in appropriation right nor any other authorization is required for the reversion of the appropriation right to the lessor's previous use.

~~(9)~~(10) A person issued a water use permit with a priority of appropriation after the date of filing of an application for a lease authorization under this section may not object to the exercise of the lease according to its terms, the renewal of the lease, or the reversion of the appropriation right to the lessor according to the lessor's previous use.

~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE MEASURING PLAN SUBMITTED UNDER THIS SECTION.

NEW SECTION. Section 5. Board designation of eligible stream reaches.

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(1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
WITH THE CONSENT OF THE COMMISSION, may apply to the board for
designation of stream reaches for which water leasing to ~~maintain or enhance~~
PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to
[section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

~~(3)(4)~~ (4) The board may designate no more than 10 stream reaches in the
state where water leasing pursuant to [section 4] may occur.

NEW SECTION. Section 6. Contributions for leasing appropriation rights
OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
contributions from public or private entities for the purpose of:

(A) leasing appropriation rights to ~~maintain or enhance~~ PROVIDE instream
flows for ~~fish, wildlife, or recreation purposes~~ THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
PURPOSES.

(2) Any contributions accepted by the department under this section must be
deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under ~~this section~~
SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
~~enhancing~~ PROVIDING instream flows for ~~fish, wildlife, or recreation~~ UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

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1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-
25

ROLL CALL VOTE

SENATE COMMITTEE AGRICULTURE

Date 3/20 Bill No. NB707 Time

NAME	YES	NO
Senator Hubert Abrams #8		✓
Senator Gary Aklestad #1		✓
Senator Esther Bengtson #27	✓	
Senator Gerry Devlin #47		✓
Senator Jack Galt #46	✓	
Senator Greg Jergeson #48	✓	
Senator Gene Thayer #23	✓	
Senator Bob Williams #39	✓	
Senator Tom Beck #44		✓

5 . 4

Jaelene Johnson
Secretary

Tom Beck
Chairman

Motion: BE CONCURRED IN AS
AMENDED - PASSED

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON HOUSE BILL 707

Call to Order: By Chairman Jack Galt, on April 20, 1989, at 11:00 A.M.

ROLL CALL

Members Present: Senator Beck, Senator Galt, and Senator Yellowtail. Representative Grady, Representative O'Keefe, and Representative Spaeth.

Members Excused: None

Members Absent: None

Staff Present: Bob Thompson, Environmental Quality Council
John Larson, Secretary of the Senate

Secretaries: Carla Turk and Jaelene Johnson

DISPOSITION OF HOUSE BILL 707

Discussion: Representative Grady - "The Stockgrowers main concern is a study. Move section 4 into section 7 on page 11, so the whole intent is a study. Along with the study, it allows the Department of Natural Resources to go through the board and commission, to actually try to purchase a lease. That is after they have gone through all the formalities...It also gives authority to go out and try to purchase the lease. Like I say, you will have to go through the Fish and Game Commission and the Board of Natural Resources. That's the main thing the Stockgrowers wanted to make sure it was in this legislation."

Senator Galt - "Well that's fine, if you have seen this amendment."

Representative Grady - "Alright I'm not sure where you want to incorporate this."

Senator Galt - "Page 9, prior to "e", line 2 on Gray bill #2.

Senator Beck - "You insert 'upon receipt of an application for a lease from Department of Fish, Wildlife and Parks, D N R C shall publish notice of the application pursuant to the provisions in 85-2-307. Parties who believe they will be adversely affected by a proposed lease, may file objection pursuant to section 85-2-308. A lease may not be approved until all objections are resolved'. If there is a certain stream reach that they are trying to demonstrate some purposes and there are objections to it; those objections have to be resolved before they can go ahead and pursue it as part of the study."

Representative Grady moves exhibit 1, Free Conference Committee, page 7 {#1}.

Senator Yellowtail expressed a curiosity to, "The difference between this proposed language and the existing language in the changed statute."

Senator Galt said that this amendment applies directly to the leasing of water.

Senator Yellowtail - "Well my question is, doesn't the existing changed statute protection for adverse impact apply anyway and isn't this a duplication? Is it purely a duplication or is there something hidden in these words here?"

Representative O'Keefe - "The intent of the amendment is to give the Senate and the House something to use on the floor to show that objections are going to be dealt with in a prescribed manner. This is as I understand, the intent that this goes no further than the existing changed statutes in 85-2-307. It is a duplication. I think that the reason for it being there is so that people who feel a need for reassurance of a right to object; the state needs to deal with those objections prior to issuing a lease."

Senator Yellowtail said 85-2-402 prevails in any case. "I need to be convinced that this is necessary if it is a duplication."

Senator Galt - "I think it is necessary. I think it will clear a lot of air out and this ties it to the leasing thing. These other statutes address other things in the water law, change of points of diversion and points of use. Now we are dealing with a whole new thing that isn't in the code now, and this ties the protest thing into this new part of the proposed water law concerning leasing."

Senator Yellowtail - "So it is substantially identical to the change process that exists in water law now?"

Senator Galt - "Absolutely, but it is tieing it directly to leasing."

Senator Yellowtail - "I still think it's frivolous but if that reassures some, perhaps then it's worthwhile."

Senator Boylan - "The State of Montana owns a lot of water, and I think that should be inclusive. The Department of Lands owns a lot of water, stored and free water. The institutions, the prison owns a lot of freed water and stored water. Montana State experiment station and its subsidiaries own water out of tributaries in Gallatin Valley. The Huntley Project on the Yellowstone River has water diverted in that. So I think in this study, that should be considered also."

Senator Galt - "That doesn't apply to the question in front of us now. They would just be water owners just like anyone else right now. Bring this up a little later or after we deal with the motion we have on the floor."

The question was called for by Senator Beck. The motion carried unanimously. See exhibit 1, of the Free Conference Committee Report, page 7 {#1}.

Representative O'Keefe read the next proposed amendment which substitutes sub-section 3, on page 9, line 29 of the Gray Bill #2. It reads a study report of the 52nd Legislature shall be adopted by the commission and department and forwarded to the Water Policy Committee who shall adopt and submit a final report by December 1, 1990." Representative O'Keefe said, "My impressions on that is the Gray Bill, as it is currently written, requires that a study report, including the findings and recommendations, must be completed by December 1, 1990. What we are requiring, as I read the proposed language, is an additional review step by the Fish and Game Commission, the Board of Natural Resources, the Water Policy Advisory Group prior to submitting that report. I would like to ask John Larson if that language requires all three of those bodies to adopt the reports, or simply to review?"

John Larson said, "The first report will be adopted by the Fish and Game Commission and the Board of Natural Resources. The final report will be adopted by the Water Policy Committee."

Representative Grady - "This would be after deletion and everything had taken place, toward the end of the study? In other words, before they went to the legislature."

Senator Galt - "Yes, and I think that's already in here. It includes the Water Policy Committee, and that's the arm of the legislature. We want the legislature to have a say in what this report is, and they're the ones who submitted it to the legislature at the next regular session."

George Ochenski - "I don't have any problems with the submittal of the report and adoption of the report. That is what we intended any how. I would say there is a very good chance the department may not have the cumbersome change process."

Senator Galt - "At least they will have been a part of the study and proposed things."

Senator Beck moved the amendment. See exhibit 1, of the Free Conference Committee Report, page 8 {#2}. The motion carried unanimously.

Representative O'Keefe - "Is everyone happy with the change the Stockgrowers asked for? That is the change of putting section 4 into Section 7, which clearly delineates and I think answers some of the concerns in the agricultural community. This is not a project perhaps but a study non the less. Do we have any problems with that?"

Carol Mosher indicated that had been there intent all along.

Jo Brunner asked, "Does the Water Policy Committee--does the legislature have to approve of the study before a lease can be written?"

Senator Galt said, "I don't think it says that in the bill."

Jo Brunner said, "Then it is conceivable that a four year lease could be written before there has been any approval or disapproval by the legislature."

Senator Beck stated, "The way, I understood it in committee, was that this is going to go before both the D N R C and the Fish and Game Commission with some input from the Water Policy Committee. In other words, there is not going to be any leasing before it goes to the Fish and Game Commission itself. That is the way I understand it, is that correct?"

Representative O'Keefe - "This is the way I understand it too."

Senator Beck continued, "After concurrence with the commissions, then there is a possibility to implement a lease for the ground experiment. I guess we are going to call it that to see if the theory it is going to work."

Jo Brunner said, "Then it is conceivable that five-four-year leases could be written before the legislature approves it?"

Senator Galt stated, "That would come in as part of the reports to the Water Policy Committee and they would have their input into it right then."

Jo Brunner asked, "Would those lease contracts terminate when the program terminates?"

Senator Beck said, "In section "e" of the Gray Bill, page 9, states a lease may not be issued for a term of more than four years, but may be renewed for up to ten years, per renewal, if allowed by law upon notification of the department. The law is what we are instigation right here."

Representative Grady said, "I think what Mrs. Brunner is getting at is, do we have to come back to the legislature before we do a lease? I guess the idea of this whole thing is how are we ever going to know if this thing is ever going to work if we actually don't go out there and try doing a lease?...This is an on the ground work, we've done all of the paperwork up to this point.....We need someone in the field, on the ground experiments, to see if it's going to work. This is what this bill is designed for."

Senator Beck stated, "That is my interpretation also. This is a study to determine whether water leasing is feasible or not in the State of Montana. It is going to take other legislation to ever implement any lease."

Senator Galt reminds everyone, "Part of that study could be a proposed lease."

Representative O'Keefe said, "We realize that as a study, in order to get those hard scientific facts, we are going to have a demonstration problem as part of that study. If you are asking, will there be a lease out there without the entire legislature approving it?--Is it

feasible to have a four year lease in place?"

Representative O'Keefe stated, "Yes, Ok five streams." He added in regard to whether leasing could occur without the entire legislature approving it, "the legislative input to the commission is going to be there. The department won't do anything that (a.) the commission doesn't want it to do and (b.) that the legislature doesn't want it to do. In two years, I would wager with you now, if I was a betting man, we still aren't going to have a lease in place. So, we are going to have one more chance to review that report in my opinion, prior to any lease being issued."

Senator Beck said there will not be a ten year lease without legislative approval.

Representative Westlake said, "The question in my mind, I have no problem with joining these two sections. In regard to the four years. I think that we would be more comfortable if it said something to the effect that if for instance the contract was going past the termination. It could, if I understand it correctly, it could be two years past the termination date of this act."

Senator Beck - "No this terminates the act in 1993."

Representative Westlake - "Are you sure? This is the problem that I see with it. If you enacted a four year lease in the last two years of the study, then terminate the study at that particular time, I don't believe there is anything that terminates those contracts."

Senator Yellowtail - "Okay, it seems to me that termination of the law that enables that lease effectively terminates the lease. So, I think there can't be any fear here."

Senator Galt - "We are arguing the merits of the bill here. Let's get right back down to the bill itself. I would propose one. We need to change it as it was in the original bill that we had for the purpose of this study. This section is the exclusive means by which the appropriations may be changed to an instream flow purpose."

Senator Beck - "Was that taken out?"

Senator Galt - "It's not in this one."

Senator Beck asked, "Why is that out of this Gray Bill #2?"

George Ochenski - "It was taken out of here because of what we are codifying. It is temporary language for the purposes of a study. That language was being codified in 707. Our original purposes were to build a continuous law. We are not doing that now; we are having a study. To put that phrase into the bill seemed appropriate to us because we are not making a permanent law here. We are making conditions under which a study may be conducted."

Senator Galt - "Excuse me there is the added an caveat. This is for the purpose of a study."

John Larson - "On page 15 of the original bill, line 6."

Glenn Marks - "When this bill was born, this language was in there. Even though this is just a study, that language should still be in there. It defines the law."

Representative O'Keefe - "I talked with Al Stone earlier today about that language and the applicability of that language. To (a.) the study, (b.) the water law in general, and (c.) the constitution. For the purposes of this study, I think that language would certainly withstand a legal task and would apply to the cases defined in the bill. The department is being allowed to lease water in accordance with this bill. I don't think there's any problem with that language. I think we get into a problem, from my discussions over all appropriators, if we try and apply a carte blanche situation to everyone in the state. That problem could lap over to exactly the thing Senator Boylan brought up about the states control of their water rights. Private individuals ability to change a irrigation right to a stock pond. It's also used for fish and wildlife. I would be willing to go with that language if we can define it to the studies."

Senator Galt - "It says for the purpose of this study."

John Larson identified the language in the original bill (page 15, lines 4 and 5, following the bracket in section 5). With an introduction that says, "for the purposes of this study."

Representative Spaeth - "This section is the exclusive means by which an appropriation may be changed to an instream flow purpose."

John Larson - "Yes."

Representative Spaeth - "What you are suggesting is that we could change that and apply it just for the purpose of this act? I think that makes good legal sense."

Senator Yellowtail - "Why is it necessary to do this? This bill clearly delineates that the Department of Fish, Wildlife, and Parks is the only potential applicant anyway, for the purposes of this study. Once again, I need to be convinced why this is absolutely necessary. This seems to be the Secretary of the Senate's idea and, might I get him to convince us..."

Senator Galt - "No, that was my idea in the original bill. But he did pick up for us that it was not in this particular bill."

Senator Yellowtail - "Alright, then I would like somebody to convince me why this is necessary."

Representative O'Keefe - "Re-thinking this thing and looking again at the language, I'm wondering if we aren't (a.) if it is necessary, and (b.) whether or not we might be creating a problem with fish, wildlife, and parks. Take the example of Painted Rock. Right here we state the exclusive means by which appropriations can be changed. They've got an appropriations and storage there but it's state water and the D N R C wants to buy it. Like they did in the Bitterroot and their changing that into an instream flow for carriage water. They would have to go through this. Which I don't think this is the intent what we want to do. I don't think that's the Senator's intent."

Senator Galt - "Painted Rock is a purchase. You buy that water. This is still applying to the leasing of water."

Representative O'Keefe - "Would it be clearer if we said that the Department of Fish, Wildlife, and Parks may lease an appropriation for the purposes of leasing."

Senator Galt - "Well, your changing the use of the water rights. So, I think the word change perhaps should be in there. The purpose of the study is to lease. It's implicit this is the only way a water right can be changed to a lease or instream flow use for the purpose of leasing."

Representative Spaeth - "I'm never quite sure if it does anything one way or the other and if it makes someone happy--I'm never quite sure why storage got people all excited."

Senator Galt - "We haven't discussed that yet, but I think this would make it much easier to sell. This is the vehicle by which any change from a water right to an instream flow right can be accomplished."

Representative Spaeth - "I don't think it's going to hurt the bill. I so move that amendment."

Representative O'Keefe - "I like the amendment. If we confine the amendment to the study and to the department, which we have done. I also read it (the) exclusive means by which appropriations may be changed. To me that goes well beyond the Department of Fish, Wildlife and Parks and their ability to work within the study."

Representative Grady - "I think we need to keep this as clean as we can keep it and see if it's going to work. If we don't make some kind of an effort to make some lease work, they're never going to work. If we put too many barriers in here, it's never going to work."

Senator Beck - "How is this going to be a barrier against leasing? I'll tell you what I'm trying to do is make this comfortable for about 26 Senators in the Senate. I think if they know the exclusive way for leasing water is through this study, and there is no other way at the present time. Until we get the study concluded, then I think what we're saying is let's get the study completed and then take a look at it down the road."

Representative O'Keefe - "I understand. Would you agree Senator that the only entity that can hold an instream flow right now for fish and wildlife purposes is the Department of Fish, Wildlife, and Parks?"

Senator Galt - "Except the reservation board."

Representative O'Keefe - "I'm trying to define this language just to the Department Fish, Wildlife, and Parks to lease water in accordance with a study and I think you are too. All I'm trying to do is get that word 'the department' into that language."

Senator Yellowtail - "To that I have language, and I would move a substitute motion. For the purpose of this study, this section is the exclusive means by which the

Department of Fish, Wildlife, and Parks may seek to change an appropriation right to an instream flow purpose'." See exhibit 1, Free Conference Committee Report, page 7 {#4}

The motion carried unanimously for the House and the Senate.

Senator Galt - "I'm not comfortable with the responsibility you've given to the Water Policy Committee. They don't have the staff or time. Gray Bill #2, page 7."

Bob Thompson - "At this point it appears the Water Policy Committee will receive approximately \$26,000 in funding. Most of that is used for committee meetings and payment of committee members. So there isn't a lot of extra money available for the committee. A lot of this study, the committee would direct, is very technical. Given the training, this staff person and probably the entire staff at E Q C, we really don't have the expertise to do it. So in some ways, the Water Policy Committee would be very dependant on the executive branch agencies to do this. Because of the lack of expertise of it's own staff."

Senator Galt - "I don't know how to change that language to make the Water Policy Committee the over-seer and the final say on these things but not put them into a collaboration that sounds as though Bob Thompson would have to go out with every fish, wildlife, and parks (person) to measure a stream...One possible alternative here, is to restructure the lead in to section 6 by saying "the Department of Fish, Wildlife, and Parks and the department, in consultation with the Water Policy Committee, shall conduct and coordinate a study that, at a minimum"...See exhibit 1, Free Conference Committee Report, page 7 {#5}. You already made an amendment in section 3 which provides that the Water Policy Committee has the final say."

Senator Galt - "Will that wording itself satisfy the Water Policy Committee and the staff of the Water Policy Committee?"

Bob Thompson - "As to the staff of the Water Policy Committee, we have no problem with that."

Representative Spaeth - "I don't think you can do much about it with a budget like that. I would move the amendment." See exhibit 1, Free Conference Committee Report, page 7 {#5}.

Senator Beck - "Ron Marcoux do you have any problem with this?"

Ron Marcoux - "Personally, I think it's going to simplify it for all of us and get the job done."

The House and the Senate adopted the amendment unanimously.

Representative Grady-"We really haven't addressed the funding. I would like to ask Ron Marcoux to talk a little bit about some funding."

Ron Marcoux - "I guess what we would like to see, from the department's standpoint, is to have some funding available for the department within the contracts. I see us having to go on in time with our existing staff and identify the unknowns. I feel the existing staff can accomplish a lot of this, but we also have some unknowns on how to deal with the adverse impacts and how to identify them. What we would like to do is request the authority to utilize federal funding that is available for the fisheries efforts. I think we could request about \$60,000 be made available to match the license dollars that already existing in the budget."

Senator Galt asked Representative Spaeth if HB 707 would need to go to Finance and Claims with \$60,000 proposed change.

Representative Spaeth - "(1.) I think you could do that with this bill without any problem, because this would become an appropriations bill. (2.) HB 100 is at the Governors desk right now, so I don't think there would be any problem. I do think you would be better served in here as far as fish, wildlife, and parks funding is concerned. They have the money."

Representative Spaeth moved to insert the language, "The federal funding, via department of fish, wildlife, and parks, may be expended up to \$60,000 of federal special revenue." See exhibit 1, Free Conference Committee Report, page 9 {#6}."

The motion carried unanimously with no dissenting votes from the House and the Senate.

Senator Galt asked if there was any comments from the audience.

Representative Westlake - "I realize there is nothing in this bill as far as addressing off-stream storage for

enhancement of fish and wildlife. That's been the stand of our particular groups through this whole thing. As far as I'm concerned it's unacceptable in my eyes unless something is addressed in the title and in the project as being part of the study. I realize that this is a very costly part of the project. This bill doesn't say that it is going to develop any off-stream storage. I can't see why we can't include that in the title. I also have a problem with section 4, not with consolidating it with section 7. I support that. I would feel better and I know the people that I'm representing would too. Let's make sure that the contracts aren't renewed or extended before the four year period of the study is concluded...We would be a lot happier with line 25 and I just have the older bill. where it says the lease may not be issued for a term of more than four years...Even if an act would be terminated and there was some on going contracts those have to be honored according to what I have been told. Regardless of whether the act has been terminated. Am I right on this retroactivity thing?"

Bob Thompson - "It would be possible under this scenario, for the Department of Natural Resources to issue a lease authorization on January 1, 1993 for four years. That means the lease would go to 1997. It would go pass the termination date. The other scenario that could evolve under this is the Department of Natural Resources could on January 1, 1990 issue a two year lease to the Department of Fish, wildlife and Parks. So, it goes to 1992 and it will be up for renewal...In which case, could be 10 additional years."

Jo Brunner - "Our water association has supported this since it came out of the House with the amendments for storage. That is the main reason that our association has supported 707. We continue to request that there is some recognition of the importance of water storage to stream preservation. I would like to offer a sentence that came up in discussion with several other organizations this morning. We felt this would recognize the benefits of water storage and preservation but it would not include an in-depth study on the costs of storage. I would like to insert and ask you to consider inserting after the words 'Board of Natural Resources and Conservation', line 6. That's the first page of the Gray Bill #1. I would like you to consider inserting after the word conservation 'to determine benefits derived by the construction of storage facilities on reaches defined'. I believe that does not require an in-depth study of great cost, but it would ask the recognition and the leasing program

that storage facilities are beneficial."

Representative Spaeth - "I would like--because the title is not substantive law. It would need to be someplace else."

Jo Brunner - "It probably needs to be within the section 7. Insert another paragraph after paragraph (ii) on page 5 following line 12, this same language. 'To determine benefits derived by the construction of storage facilities on the reaches defined'." See exhibit 4, Gray Bill #1.

Jo Brunner - "The top portion of the study requests the definition of the reach."

Representative Westlake asked Glenn Marks, "Where are we at on the water storage within the water plans? Do you know the Governor's intentions of where we're going to go with that?"

Glenn Marks - "The Department of Natural Resources starts their scoping sessions of the next eight water plans in May. We have meetings set for August 8th. We want water storage looked at. We are trying to get public input before we suggest the next water plan. We're trying to get public input before the subject of the next water process is picked...Certainly, the Governor wants storage to be part of the next water plan...I'm absolutely convinced that storage will be part of the next legislature and I hope we come to the next session with a water storage bill."

Representative Grady - "I want to tell you where I come from. I am the originator of this bill. I had to talk to the other people long and hard to convince them, "Let's go back to the table". One of the main things was storage all along. It was a big problem. It is probably the reason the bill got killed originally. I guess, I can see some real bad things coming down the road if we don't make some effort here to do something. That's why we came up with this piece of legislation. I don't want storage in here. I don't think we need storage in this bill. I've made up my mind, as well as a few others that have put this stuff together. If we have to include storage in here, we're probably going to kill this piece of legislation and we'll be back where we were. I think storage is very costly."

Senator Galt - "You'd have to convince me that a little sentence suggesting storage would kill the bill."

Representative Grady - "If you address it in the study, Senator Galt, you're talking about a whole lot more cost. I can't see how you can study storage without getting into a huge amount of dollars. Storage is very costly as you all know...I don't know what period of time you are looking to do with storage, compared to what we can do with leasing."

Senator Galt - "Would there be anything wrong with the fish and game technician doing his measurement on the stream, and just noting there's a good dam site on this stream?"

Representative O'Keefe - "I'm a fan of storage, particularly off-stream storage. I think it's essential. I think it is something that needs to be looked at. I don't know if it belongs in the bill. We spent \$1.6 million in the Yellowstone Basin from 1981 through 1983, on Senator Manning's bill, to determine potential off-stream storage sites in that basin. Hydroelectric production, instream flow restrictions, wildlife benefits, you name it, they were in that study. \$400,000 of that money was spent on the economic and benefit analysis portion of those off-stream storage facilities. My concern is if we use the word determined, as proposed, Senator Beck will end up asking not for \$60,000, but closer to \$200,000. I see determined as changing the whole focus of this study. It becomes a storage study not a leasing study. I think we have the provisions within the law for storage studies for water development. Determining the effects of storage at a site is not as easy as having storage as an object of the study."

Representative Spaeth - "I understand the people on one side are concerned that the whole amount of money will just be eaten up, because storage is an expensive thing to study. I also think that people on the other side think storage is something that should be looked at and emphasized. I'm not sure how much economically feasible storage we have left available in this state. We have used up a very large portion of our economical sites. I think it is important to a lot of people to at least have that included as a consideration. I've come up with some language to that affect on page 8. Insert 'to determine if there may be possible storage sites for the reaches of the stream defined and to include information which may be obtained about such sites without incurring additional expenditures'. There has been a lot of information the bureau reclamation has put together, and that could be

referenced for when it comes before some kind of review...I'm trying to say this should not cost us a whole lot more money. This information may be obtained without additional expenditures."

Jo Brunner - "We would agree with Representative Spaeth's amendment."

Stan Bradshaw - "Keep in mind what this bill is to be used for. It's a study to see if a lease is going to work and that's all it is. I just think the idea of this study suggests that, on the side, people ought to be looking out for storage."

Representative Grady - "How much work has D N R C done in studying sites already? I think the amendment goes broader than that."

Senator Beck asked Senator Galt - "I don't know what study the Governor has on storage, but I assuming. What would be the possibility of putting into his recommendation on storage emphasis to look upon those streams which have been identified as lease streams for the purposes of surviving the fisheries. If we identify streams that have to be leased to maintain the fisheries in this study, the emphasis should be put on storage and maybe the Governor's policy."

Glenn Marks - "What I would like to do is to come back in two years with a plan that says; we're going to build a little dam on this creek, this is how we're going to do it, and this how we're going to fund it...Keep in mind that around this bill evolves the water plan process. It took us a year and half to get to this point. If water storage is looked at next year, then water storage will get us to this point."

Representative Spaeth - "What I'm trying to do here is come up with language that might not do a whole lot but make a lot of people happy. I'm not sure what the intransigents against the amendment is. It is not going to incur any additional costs, and while they're out there they can glance around and somebody can reference a study. I'm not even saying they should be included. There should be a reference to storage sites.. What I have tried to do is compromise so that both sides could agree."

Representative Spaeth said, "I move the language, 'to determine that there may be possible storage sites for the reaches to the stream to find and to reference any information that may be available on the sites without

incurring additional expenditures'."

Representative O'Keefe - "I'm going to offer a substitute motion. I would like, within the bill, a statement that says, "There's nothing in this act to preclude the consideration of storage for potential beneficial use of water in any of the stream reaches under consideration."

Representative Spaeth - "I appreciate what Representative O'Keefe is trying to do. (1.) He says less than I did, and (2.) I think that he has failed to make the storage folks happy with it. You are back to square one if you adopt that."

Senator Galt - Asked if they were ready for the substitute motion by Representative O'Keefe. The motion failed, with Representative Spaeth, Senators Beck, and Senator Galt voting no.

Senator Galt - Announced they would be going back to the original motion by Representative Spaeth. The motion failed again with Representative O'Keefe and Representative Grady voting no.

Senator Beck said, "I have one more concern with the bill, and that's with Bob Thompson's comments. I thought this was a four year study dealing with the leases. Evidently these leases can be extended past and beyond the study. I would like to see something in here that would say, when this study terminates, the leases also terminate unless there is further legislation to extend those leases."

Senator Beck asked Bob Thompson if this language needed to be clarified.

Bob Thompson - "It all depends on what you want. If indeed you want the lease to end on the termination date June 30, 1993, then this may or may not accomplish it. It does say a lease can be issued for four years. So if the lease is issued on June 30, 1991 it could go until June 30, 1995."

Senator Beck - "My intent is to keep this within the bounds of this study. If we do extend this, the leases can be extended. If this piece of legislation terminates, I want it concurrent, with the leases also terminating."

Representative O'Keefe - "I would move an amendment on the Gray Bill number 2, page 9, line 3; after years on line three, insert a (period), strike the language between

'but and department on line 5' and insert 'if allowed by law existing leases may be renewed for up to ten years'."

George Ochenski - "What happens if this piece of legislation terminates and in fact it does work and you changed your words? You want those leases to be able to be renewed without going back through it."

Representative Spaeth - "I don't see why we can't say, in the bill itself, 'upon the event of the act terminating or with no re-authorization of leasing is made by the legislature then all present existing leases shall be terminated'."

Representative O'Keefe - "I shall withdraw my motion."

Senator Galt - "Where do we want this to be put in?"

Senator Beck - "Can you put it in with the terminating?"

Representative Spaeth - "In section 6 sub (e), following department, insert "If this section terminates without re-authorization by the legislature, all leases and lease authorizations expire on the date of termination." See exhibit 1, Free Conference Committee Report, page 8 {#11}.

Representative Spaeth moved the language providing for termination on page 8, {#11}. The House and Senate concurred in it unanimously.

Representative O'Keefe - "I would like to move that the language be included that this act is affective upon passage."

The House and Senate concurred in it unanimously.

Carol Mosher - "The wording critical low flow periods. Is that in there?"

Senator Galt - "We never addressed that."

Representative Grady - "I talked with the Stockgrowers and we discussed it somewhat. Why we have that in there is because we all know sometimes streams get low. We still have a flow which is going all the way through, but there is not enough water to maintain the temperature of that water and you start losing fish. That is the idea of this whole thing, is to maintain fisheries."

Representative Grady moved the Gray Bill #2, TO BE CONCURRED
IN AS AMENDED.

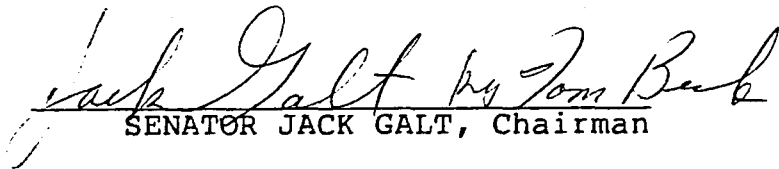
Bob Thompson - "The bill, as you have seen it, does not have
all of the amendments that have occurred through the
session. As a technical question, is the intent to
consider a substitute bill this afternoon?"

John Larson - "Just strike everything that's happened to the
bill and insert the Gray Bill #2."

The motion carried. The Senate concurred unanimously with
Senator Galt, Senator Beck, and Senator Yellowtail
voting yes. The House concurred with Representative
O'Keefe and Representative Grady voting yes, and
Representative Spaeth voting no.

ADJOURNMENT

Adjournment At: 12:50 P.M.


SENATOR JACK GALT, Chairman

JG/jj-ct

51st LEGISLATIVE SESSION -- 1989

Date 4-20-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR TOM BECK	X		
SENATOR JACK GALT	X		
SENATOR BILL YELLOWTAIL	X		
REP. ED GRADY	X		
REP. MARK O'KEEFE	X		
REP. GARY SPAETH	X		

Each day attach to minutes.

Free Conference Committee Report
on HB 707
Report No. 1, April 20, 1989
page 1 of 9-

Mr President and Mr. Speaker:

We, your Free Conference Committee on HB 707 met and considered:

The Senate amendments to HB 707 (third reading copy -- blue) in their entirety.

We recommend that HB 707 (reference copy -- salmon) be amended as follows:

1. Title, lines 7 through 23.

Following: "AN ACT"

Strike: lines 7 through 23 in their entirety

Insert: "PROVIDING FOR A THOROUGH STUDY THAT INCLUDES A PILOT PROGRAM TO LEASE WATER RIGHTS FOR THE PURPOSE OF MAINTAINING OR ENHANCING STREAMFLOWS FOR THE BENEFIT OF FISHERIES IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES; REQUIRING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO COMPLETE A STUDY REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON WATER LEASING FOR STREAMFLOWS UNDER THIS ACT; APPROPRIATING FEDERAL SPECIAL REVENUE TO THE DEPARTMENT OF FISH, WILDLIFE, PARKS TO UNDERTAKE A WATER LEASING STUDY; AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

2. Page 1, line 25 through page 4, line 14.

Strike: the statement of intent in its entirety

3. Pages 4 through 23.

Strike: everything following the enacting clause

Insert: "Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water; or

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 6].

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under [section 6].

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department. (5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Commission" means the fish and game commission provided for in 2-15-3402.

(7) "Declaration" means the declaration of an existing right filed with the department under section 9, Chapter 452, Laws of 1973.

~~(7)~~(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(11)~~(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(12)~~(13) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(14)~~(15) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

FREE CONFERENCE COMMITTEE, HB 707

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~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter 7.

~~(18)~~(19) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The Except for a lease authorization pursuant to [section 6] that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application was made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department

pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and source of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

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(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that ~~such~~ a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(8) If a change is not ~~completed~~ as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(9) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(10) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(11) A change in appropriation right contrary to the provisions of this section is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner ~~such an~~ unauthorized change in appropriation right. ~~No~~ A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 3. Section 85-2-404, MCA, is amended to read:

"85-2-404. ~~Abandonment of appropriation right.~~ If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms

and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) If an appropriator ceases to use all or part of his appropriation right because the land to which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside program:

(a) the set-aside and resulting reduction in use of the appropriation right does not represent an intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the terms and conditions attached to the right; and

(b) the period of nonuse that occurs for part or all of the appropriation right as a result of the contract may not create or may not be added to any previous period of nonuse to create a prima facie presumption of abandonment.

(4) The lease of an existing right pursuant to [section 6] does not constitute an abandonment by the lessor or serve as evidence that could be used to establish an abandonment by the lessor of any part of the right.

~~(4)~~(5) Subsections (1) and (2) do not apply to existing rights until they have been determined in accordance with part 2 of this chapter."

NEW SECTION. Section 4. Board designation of eligible stream reaches. (1) The department of fish, wildlife, and parks, with the consent of the commission, may apply to the board for designation of stream reaches for which water leasing to maintain or enhance streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to [section 4] only if it finds that water leasing is necessary to maintain or enhance streamflows for fisheries.

(3) The board may designate no more than 5 stream reaches in the state where water leasing pursuant to [section 6] may occur.

NEW SECTION. Section 5. Contributions for leasing appropriation rights -- general spending authority. (1) The department may accept contributions from public or private entities for the purpose of leasing appropriation rights to maintain or enhance instream flows for the benefit of fisheries;

(a) Any contributions accepted by the department under this section must be deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(b) The department shall expend money obtained for and deposited in the fish and wildlife mitigation trust fund exclusively to lease existing rights for the purpose of maintaining

or enhancing instream flows for fisheries.

(2) The department may also expend other departmental funds to lease existing rights for the purpose of maintaining or enhancing instream flows for fisheries.

NEW SECTION. Section 6. Water leasing study. (1) The department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease.

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of fish, wildlife, and parks and the department may engage in the activities described in this subsection. [For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose.]

(a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream reaches determined eligible by the board pursuant to [section 4].

(1) (b) Upon receipt of an application for a lease from the department of fish, wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties who believe they may be adversely affected by the proposed lease may file an objection as provided in 85-2-308. A lease may not be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the department shall authorize a lease of an existing right for the purpose of maintaining or enhancing streamflows for the benefit of fisheries if the applicant submits a complete application and meets the requirements of 85-2-402.

(c) The application for a lease authorization must include specific information on the length and location of the stream reach in which the streamflow shall be maintained or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow shall be measured.

(d) The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows below the lessor's point of diversion.

(e) The lease may not be issued for a term of more than 4 years but may be renewed for up to 10 years per renewal, if allowed by law and upon notification to the department. [If this section terminates without reauthorization by the legislature, all leases and lease authorizations expire on the date of termination.] Upon receiving notice of a lease renewal, the department shall notify other appropriators potentially affected by the lease and shall allow 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is not required for a renewal unless an appropriator, other than an appropriator described in subsection (2)(i), submits evidence of adverse effects to his rights that has not been considered previously. If new evidence is submitted, a lease authorization must be obtained according to the requirements of 85-2-402.

(f) During the term of the original lease, the department may modify or revoke the lease authorization if an appropriator, other than an appropriator described in subsection (2)(i), proves by substantial credible evidence that his water right is adversely affected.

(g) The priority of appropriation for a lease under this section is the same as the priority of appropriation of the right that is leased.

(h) Neither a change in appropriation right nor any other authorization is required for the reversion of the appropriation right to the lessor's previous use.

(i) A person issued a water use permit with a priority of appropriation after the date of filing of an application for a lease authorization under this section may not object to the exercise of the lease according to its terms, the renewal of the lease, or the reversion of the appropriation right to the lessor according to the lessor's previous use.

(j) The department of fish, wildlife, and parks shall pay all costs associated with installing measuring devices or providing personnel to measure streamflows according to the measuring plan submitted under this section.

(3) A study report must be adopted by the board and commission and submitted to the water policy committee, which shall complete a final report by December 1, 1990.

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NEW SECTION. Section 7. Appropriation of federal revenue for water leasing study. For the biennium ending June 30, 1991, the department of fish, wildlife and parks may expend up to \$60,000 of federal special revenue to undertake the water leasing study required under [section 6].

6

NEW SECTION. Section 8. Extension of authority. Any existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

NEW SECTION. Section 9. Codification instruction. (1) [Sections 4 and 6] are intended to be codified as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4 and 6].

(2) [Section 5] is intended to be codified as an integral part of Title 87, chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to [section 5].

NEW SECTION. Section 10. Effective date. [This act] is effective on passage and approval.

12

NEW SECTION. Section 11. Termination. [This act] terminates June 30, 1993."
-END-

And that this Conference Committee Report be adopted.

FOR THE SENATE

FOR THE HOUSE

Sen. Galt, Chairman

Rep. O'Keefe, Chairman

Sen. Beck

Rep. Spaeth

Sen. Yellowtail

Rep. Grady

ADOPT

REJECT

Note: This gray bill is written in "introduced" bill form.

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A PILOT PROGRAM TO LEASE WATER RIGHTS FOR THE PURPOSE OF MAINTAINING OR ENHANCING STREAMFLOWS FOR THE BENEFIT OF FISHERIES IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES; REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON WATER LEASING FOR INSTREAM FLOWS UNDER THIS ACT; AMENDING SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water; or,

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 6].

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

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1 (c) a use of water by the department of fish, wildlife, and parks pursuant to
2 a lease authorized under [section 6].

3 (3) "Board" means the board of natural resources and conservation
4 provided for in 2-15-3302.

5 (4) "Certificate" means a certificate of water right issued by the department.

6 (5) "Change in appropriation right" means a change in the place of
7 diversion, the place of use, the purpose of use, or the place of storage.

8 (6) "Commission" means the fish and game commission provided for in 2-
9 15-3402.

10 (7) "Declaration" means the declaration of an existing right filed with the
11 department under section 8, Chapter 452, Laws of 1973.

12 ~~(7)~~(8) "Department" means the department of natural resources and
13 conservation provided for in Title 2, chapter 15, part 33.

14 ~~(8)~~(9) "Existing right" means a right to the use of water which would be
15 protected under the law as it existed prior to July 1, 1973.

16 ~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath
17 the bed of a stream, lake, reservoir, or other body of surface water, and which
18 is not a part of that surface water.

19 ~~(10)~~(11) "Permit" means the permit to appropriate issued by the department
20 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

21 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
22 state agency, political subdivision, the United States or any agency thereof, or
23 any other entity.

24 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
25 public corporation, or district created pursuant to state law or other public body
26 of the state empowered to appropriate water but not a private corporation,
27 association, or group.

28 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
29 negligent operation of an appropriation or water distribution facility or the
30 application of water to anything but a beneficial use.

31 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
32 regardless of its character or manner of occurrence, including but not limited to
33 geothermal water, diffuse surface water, and sewage effluent.

34 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

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(16)(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

(17)(18) "Water master" means a master as provided for in Title 3, chapter 7.

(18)(19) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The Except for a lease authorization pursuant to [section 6] that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

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1 (iv) the availability and feasibility of using low-quality water for the purpose for
2 which application has been made;

3 (v) the effects on private property rights by any creation of or contribution to
4 saline seep; and

5 (vi) the probable significant adverse environmental impacts of the proposed
6 use of water as determined by the department pursuant to Title 75, chapter 1,
7 or Title 75, chapter 20.

8 (4) The department may not approve a change in purpose of use or place
9 of use for a diversion that results in 4,000 or more acre-feet of water a year
10 and 5.5 or more cubic feet per second of water being consumed unless:

11 (a) the applicant proves by clear and convincing evidence and the
12 department finds that the criteria in subsections (2) and (3) are met; and

13 (b) the department then petitions the legislature and the legislature affirms
14 the decision of the department after one or more public hearings.

15 (5) (a) The state of Montana has long recognized the importance of
16 conserving its public waters and the necessity to maintain adequate water
17 supplies for the state's water requirements, including requirements for reserved
18 water rights held by the United States for federal reserved lands and in trust for
19 the various Indian tribes within the state's boundaries. Although the state of
20 Montana also recognizes that, under appropriate conditions, the out-of-state
21 transportation and use of its public waters are not in conflict with the public
22 welfare of its citizens or the conservation of its waters, the following criteria must
23 be met before out-of-state use may occur:

24 (b) The department and, if applicable, the legislature may not approve a
25 change in appropriation right for the withdrawal and transportation of appropriated
26 water for use outside the state unless the appropriator proves by clear and
27 convincing evidence and, if applicable, the legislature approves after one or
28 more public hearings that:

29 (i) depending on the volume of water diverted or consumed, the applicable
30 criteria and procedures of subsection (2) or (3) are met;

31 (ii) the proposed out-of-state use of water is not contrary to water
32 conservation in Montana; and

33 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
34 public welfare of the citizens of Montana.

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1 (c) In determining whether the appropriator has proved by clear and
2 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
3 will be met, the department and, if applicable, the legislature shall consider the
4 following factors:

5 (i) whether there are present or projected water shortages within the state of
6 Montana;

7 (ii) whether the water that is the subject of the proposed change in
8 appropriation might feasibly be transported to alleviate water shortages within the
9 state of Montana;

10 (iii) the supply and sources of water available to the applicant in the state
11 where the applicant intends to use the water; and

12 (iv) the demands placed on the applicant's supply in the state where the
13 applicant intends to use the water.

14 (d) When applying for a change in appropriation right to withdraw and
15 transport water for use outside the state, the applicant shall submit to and
16 comply with the laws of the state of Montana governing the appropriation and
17 use of water.

18 (6) For any application for a change in appropriation right involving 4,000 or
19 more acre-feet of water a year and 5.5 or more cubic feet per second of water,
20 the department shall give notice of the proposed change in accordance with 85-
21 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
22 its approval or denial of the proposed change. The department shall provide
23 notice and may hold one or more hearings upon any other proposed change if
24 it determines that such a change might adversely affect the rights of other
25 persons.

26 (7) The department or the legislature, if applicable, may approve a change
27 subject to such terms, conditions, restrictions, and limitations as it considers
28 necessary to satisfy the criteria of this section, including limitations on the time
29 for completion of the change. The department may extend time limits specified
30 in the change approval under the applicable criteria and procedures of 85-2-
31 312(3).

32 (8) If a change is not completed as approved by the department or
33 legislature or if the terms, conditions, restrictions, and limitations of the change
34 approval are not complied with, the department may, after notice and opportunity

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1 for hearing, require the appropriator to show cause why the change approval
2 should not be modified or revoked. If the appropriator fails to show sufficient
3 cause, the department may modify or revoke the change approval.

4 (9) The original of a change approval issued by the department must be
5 sent to the applicant, and a duplicate must be kept in the office of the
6 department in Helena.

7 (10) A person holding an issued permit or change approval that has not
8 been perfected may change the place of diversion, place of use, purpose of
9 use, or place of storage by filing an application for change pursuant to this
10 section.

11 (11) A change in appropriation right contrary to the provisions of this section
12 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
13 knowingly permit, aid, or assist in any manner ~~such an~~ unauthorized change in
14 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
15 personally or through an agent, officer, or employee, attempt to change an
16 appropriation right except in accordance with this section."

17 Section 3. Section 85-2-404, MCA, is amended to read:

18 "85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases
19 to use all or a part of his appropriation right with the intention of wholly or
20 partially abandoning the right or if he ceases using his appropriation right
21 according to its terms and conditions with the intention of not complying with
22 those terms and conditions, the appropriation right shall, to that extent, be
23 ~~deemed~~ considered abandoned and shall immediately expire.

24 (2) If an appropriator ceases to use all or part of his appropriation right or
25 ceases using his appropriation right according to its terms and conditions for a
26 period of 10 successive years and there was water available for his use, there
27 ~~shall be~~ is a prima facie presumption that the appropriator has abandoned his
28 right in whole or for the part not used.

29 (3) If an appropriator ceases to use all or part of his appropriation right
30 because the land to which the water is applied to a beneficial use is contracted
31 under a state or federal conservation set-aside program:

32 (a) the set-aside and resulting reduction in use of the appropriation right
33 does not represent an intent by the appropriator to wholly or partially abandon
34 the appropriation right or to not comply with the terms and conditions attached

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1 to the right; and

2 (b) the period of nonuse that occurs for part or all of the appropriation right
3 as a result of the contract may not create or may not be added to any
4 previous period of nonuse to create a prima facie presumption of abandonment.

5 (4) The lease of an existing right pursuant to [section 6] does not constitute
6 an abandonment by the lessor or serve as evidence that could be used to
7 establish an abandonment by the lessor of any part of the right.

8 ~~(4)(5)~~ Subsections (1) and (2) do not apply to existing rights until they have
9 been determined in accordance with part 2 of this chapter."

10 NEW SECTION. Section 4. Board designation of eligible stream reaches.

11 (1) The department of fish, wildlife, and parks, with the consent of the
12 commission, may apply to the board for designation of stream reaches for which
13 water leasing to maintain or enhance streamflows pursuant to [section 4] may
14 occur.

15 (2) The board may declare a stream reach eligible for leasing pursuant to
16 [section 4] only if it finds that water leasing is necessary to maintain or enhance
17 streamflows for fisheries.

18 (3) The board may designate no more than 5 stream reaches in the state
19 where water leasing pursuant to [section 6] may occur.

20 NEW SECTION. Section 5. Contributions for leasing appropriation rights --
21 general spending authority. (1) The department may accept contributions from
22 public or private entities for the purpose of leasing appropriation rights to
23 maintain or enhance instream flows for the benefit of fisheries;

24 (a) Any contributions accepted by the department under this section must be
25 deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

26 (b) The department shall expend money obtained for and deposited in the
27 fish and wildlife mitigation trust fund exclusively to lease existing rights for the
28 purpose of maintaining or enhancing instream flows for fisheries.

29 (2) The department may also expend other departmental funds to lease
30 existing rights for the purpose of maintaining or enhancing instream flows for
31 fisheries.

32 NEW SECTION. Section 6. Water leasing study. (1) The water policy
33 committee, in cooperation with the department of fish, wildlife, and parks and the
34 department of natural resources and conservation, shall conduct and coordinate

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1 a study that, at a minimum:

2 (a) provides the following data for for each of the pilot leases:

3 (i) the length of the stream reach and how it is determined;

4 (ii) technical methods and data used to determine critical streamflow or
5 volume needed to preserve fisheries;

6 (iii) legal standards and technical data used to determine and substantiate the
7 amount of water available for instream flows through leasing of existing rights;

8 (iv) contractual parameters, conditions, and other steps taken to ensure that
9 leases and lease authorizations in no way harm other appropriators, particularly
10 if the stream is one that experiences natural dewatering; and

11 (v) methods and technical means used to monitor use of water under the
12 leases;

13 (b) based on the data provided under subsection (1)(a), develops a
14 complete model of a water lease and lease authorization that includes a step-by-
15 step explanation of the process from initiation to completion.

16 (2) For purposes of undertaking the study described in subsection (1) and
17 as authorized by law, the department of fish, wildlife, and parks and the
18 department may engage in the activities described in this subsection.

19 (a) The department of fish, wildlife, and parks, with the consent of the
20 commission, may lease existing rights for the purpose of maintaining or
21 enhancing streamflows for the benefit of fisheries in stream reaches determined
22 eligible by the board pursuant to [section 4].

23 (b) The department shall authorize a lease of an existing right for the
24 purpose of maintaining or enhancing streamflows for the benefit of fisheries if the
25 applicant submits a complete application and meets the requirements of 85-2-
26 402.

27 (c) The application for a lease authorization must include specific information
28 on the length and location of the stream reach in which the streamflow will be
29 maintained or enhanced and must provide a detailed streamflow measuring plan
30 that describes the points where and the manner in which the streamflow will be
31 measured.

32 (d) The maximum quantity of water that may be leased is the amount
33 historically diverted by the lessor. However, only the amount historically
34 consumed, or a smaller amount if specified by the department in the lease

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1 authorization, may be used to maintain or enhance streamflows below the
2 lessor's point of diversion.

3 * (e) The lease may not be issued for a term of more than 4 years but may
4 be renewed for up to 10 years per renewal if allowed by law and upon
5 notification to the department. Upon receiving notice of a lease renewal, the
6 department shall notify other appropriators potentially affected by the lease and
7 shall allow 30 days for submission of new evidence of adverse effects to other
8 water rights. A lease authorization is not required for a renewal unless an
9 appropriator, other than an appropriator described in subsection (9), submits
10 evidence of adverse effects to his rights that has not been considered
11 previously. If new evidence is submitted, a lease authorization must be obtained
12 according to the requirements of 85-2-402.

13 (f) During the term of the original lease, the department may modify or
14 revoke the lease authorization if an appropriator, other than an appropriator
15 described in subsection (9), proves by substantial credible evidence that his
16 water right is adversely affected.

17 (g) The priority of appropriation for a lease under this section is the same
18 as the priority of appropriation of the right that is leased.

19 (h) Neither a change in appropriation right nor any other authorization is
20 required for the reversion of the appropriation right to the lessor's previous use.

21 (i) A person issued a water use permit with a priority of appropriation after
22 the date of filing of an application for a lease authorization under this section
23 may not object to the exercise of the lease according to its terms, the renewal
24 of the lease, or the reversion of the appropriation right to the lessor according
25 to the lessor's previous use.

26 (j) The department of fish, wildlife, and parks shall pay all costs associated
27 with installing measuring devices or providing personnel to measure streamflows
28 according to the measuring plan submitted under this section.

29 (3) A study report that includes findings and recommendations concerning
30 subsections (1) and (2) must be completed by December 1, 1990.

31 NEW SECTION. Section 7. Extension of authority. Any existing authority to
32 make rules on the subject of the provisions of [this act] is extended to the
33 provisions of [this act].

34 NEW SECTION. Section 8. Codification instruction. (1) [Sections 4 and 6]

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1 are intended to be codified as an integral part of Title 85, chapter 2, part 4,
2 and the provisions of Title 85, chapter 2, part 4, apply to [sections 4 and 6].
3 (2) [Section 5] is intended to be codified as an integral part of Title 87,
4 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
5 [section 5].

6 NEW SECTION. Section 9. Termination. [This act] terminates June 30,
7 1993. -END-

8

SENATE COMMITTEE OF THE WHOLE AMENDMENT

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April 14, 1989 11:56 am

SENATE COMMITTEE OF THE WHOLE, HB 707

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April 14, 1989

Mr. Chairman: I move to amend HB 707 (third reading copy -- blue) as follows:

1. Amend the Senate Committee on Agriculture, Livestock and Irrigation amendments dated March 21, 1989, as follows:

Amendment no. 24

In Insert

Strike: "The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."

Amendment no. 28.

Strike: "Strike: 'substantial credible'"

Insert: "a preponderance of the"

Amend third reading copy as follows:

2. Title.

Following: line 18

Insert: "REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON THE PRACTICAL AND LEGAL WORKABILITY OF THIS ACT;"

3. Page 18.

Following: line 21

Insert: NEW SECTION. Section 8. Report to legislature by water policy committee. (1) The water policy committee, in cooperation with the department of fish, wildlife, and parks and the department of natural resources and conservation, shall conduct and coordinate a study that, at a minimum:

- (a) identifies a range of water leasing alternatives that may be considered in developing instream water leasing legislation;
- (b) develops criteria for selecting stream reaches and evaluates and identifies five stream reaches where water leasing may be a feasible alternative;
- (c) evaluates and pursues opportunities for voluntary water leasing in the identified stream reaches;
- (d) provides the following data for each of the identified stream reaches:
 - (i) the length of the stream reach and how it is determined;
 - (ii) technical methods and data to be used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data that may be used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps that may be taken to ensure that leases and lease authorizations in no way harm other appropriators, particularly if the stream is one that experiences natural dewatering;

(v) methods and technical means that would be used to monitor use of water under the leases;

(vi) legal implications that water leasing would present for appropriators holding existing rights to water within and below the stream reach;

(vii) comparison of the costs and benefits of water leasing with the costs and benefits of additional storage for the stream reach;

(viii) socioeconomic impacts that water leasing would have on local communities; and

(ix) fiscal impacts that water leasing would have on the state of Montana;

(f) based on the data provided under subsection (1)(d), develops a complete model of a possible water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) The report must be completed by December 1, 1990."

Renumber: subsequent sections

4. Page 19, line 11.

Strike: "October 1, 1999"

Insert: "June 30, 1991"

ADOPT

REJECT

Signed: 

Senator Sec

SENATE STANDING COMMITTEE REPORT

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March 21, 1989

SENATE COMMITTEE ON AGRICULTURE, HB 707
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MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration HB 707 (third reading copy -- blue), respectfully report that HB 707 be amended and as so amended be concurred in:

Sponsor: Iverson ()

1. Title, lines 8 and 9.

Following: "PURPOSE OF"

Strike: "ENHANCING OR MAINTAINING"

Insert: "PROVIDING"

2. Title, line 9.

Following: "FOR"

Strike: remainder of line 9

Insert: "THE BENEFIT OF FISHERIES"

3. Title, line 17.

Strike: "DEPARTMENT"

Insert: "BOARD"

4. Page 2, line 2.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

5. Page 2, line 3.

Following: line 2

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

6. Page 2, lines 6 and 7.

Strike: "enhance" on line 6 through "recreation" on line 7

Insert: "provide for fisheries"

7. Page 2, line 9.

Following: "parks"

Insert: "that have the approval of the fish and game commission"

8. Page 3, line 4.

Following: "conservation"

Strike: "will"

Insert: ", with the consent of the board, shall"

9. Page 3, lines 23 and 24.

Following: "authorization" on line 23

Strike: remainder of line 23 through "contract" on line 24

10. Page 4, line 2.

Following: "conservation"

Strike: "should"

Insert: ", with the consent of the board, shall"

11. Page 4, line 5.

Following: "are not"

Strike: "or probably will not be"

12. Page 5, line 17.

Following: line 16

Insert: "(6) "Commission" means the fish and game commission provided for in 2-15-3402."

Re-number: subsequent subsections

13. Page 14, line 13.

Following: "to"

Strike: "enhance or maintain"

Insert: "provide"

14. Page 14, line 14.

Following: "for"

Strike: "fish, wildlife, or recreation"

Insert: "benefit of fisheries"

15. Page 14, line 16.

Following: "parks"

Insert: ", with the consent of the commission, "

16. Page 14, lines 17 and 18.

Following: "of" on line 17

Strike: "maintaining or enhancing"

Insert: "providing"

Following: "for" on line 17

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

17. Page 14, line 22.

Following: "department"

Insert: ", with the consent of the board,"

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18. Page 14, line 23.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

19. Page 14, line 24.

Following: "for"

Strike: "fish, wildlife, or recreation"

Insert: "the benefit of fisheries"

20. Page 15, lines 5 and 6.

Following: "streamflow" on line 5

Strike: "will" through "enhanced" on line 6

Insert: "must be provided"

Following: "must" on line 6

Strike: "provide"

Insert: "include"

21. Page 15, line 8.

Strike: "will"

Insert: "must"

22. Page 15, line 12.

Strike: "lessor"

Insert: "lessor's crop, if applicable, and excluding water used as recharge or return flow"

23. Page 15, line 14.

Following: line 13

Strike: "enhance or maintain"

Insert: "provide"

24. Page 15, line 21.

Following: line 20

Insert: "(5) The department of fish, wildlife, and parks has the responsibility to prove to the board under 85-2-402 that a proposed lease authorization does not adversely affect existing water rights. The department of fish, wildlife, and parks shall pay the cost, including reasonable attorney fees, for any appropriator who successfully objects to a proposed department of fish, wildlife, and parks lease."

ReNUMBER: subsequent subsections

25. Page 16, line 4.

Strike: "(9)"

Insert: "(10)"

26. Page 16, line 6.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

27. Page 16, line 8.

Following: "department"

Insert: ", with the consent of the board,"

28. Page 16, line 10.

Strike: "(9)"

Insert: "(10)"

Following: "by"

Strike: "substantial credible"

Insert: "a preponderance of the"

29. Page 16, line 11.

Following: "."

Insert: "If an appropriator proves adverse effects to his water rights, the department of fish, wildlife, and parks shall pay to the appropriator an amount equal to the damages that resulted from exercise of its lease and the costs of proving the adverse effects, including reasonable attorney fees and court costs. This provision applies only to water leases entered into under this section."

30. Page 17, line 5.

Following: "parks,"

Strike: "in consultation with the department"

Insert: "with the consent of the commission"

31. Page 17, line 7.

Following: "to"

Strike: "maintain or enhance"

Insert: "provide"

32. Page 17, line 12.

Following: line 11

Strike: "maintain" through "recreation"

Insert: "provide for fisheries"

33. Page 17, line 14.

Insert: "(3) Upon declaring a stream reach eligible for leasing, the board shall request the department to prepare an analysis concerning whether longer term solutions to the critical low flows in the stream reach are feasible. Longer term solutions to be considered include storage enhancement or development and recharge from ground water sources. The preparation of or recommendations resulting from the analysis may not preclude, inhibit, or delay the negotiation or implementation of leases on the stream reach as provided in [section 4]."

Renumber: subsequent subsection

34. Page 17, lines 21 through 23.

Following: "to" on line 21

Strike: "maintain" on line 21 through "enhance" on line 22

Insert: "provide"

Following: "for" on line 22

Strike: remainder of line 22 through "purposes" on line 23

Insert: "the benefit of fisheries"

35. Page 17, line 24 through page 18, line 1.

Following: "TO" on line 24

Strike: remainder of line 24 through "ENHANCE" on line 25

Insert: "provide"

Following: "STREAMFLOWS" on line 25

Strike: remainder of line 25 through "PURPOSES" page 18, line 1

36. Page 18, line 8.

Following: "of"

Strike: "maintaining or enhancing"

Insert: "providing"

37. Page 18, line 9.

Following: "flows"

Strike: "for" through "recreation"

38. Page 18, lines 14 and 15.

Following: "TO" on line 14

Strike: "MAINTAIN OR ENHANCE"

Insert: "provide"

Following: "STREAMFLOWS" on line 14

Strike: remainder of line 14 through "PURPOSES" on line 15

39. Page 18, line 19.

Strike: "DEPARTMENT" in two places

Insert: "board"

40. Page 19, line 2.

Following: "4"

Strike: "and"

Insert: ", "

Following: "5"

Insert: ", and 7"

41. Page 19, line 5.

Following: "4"

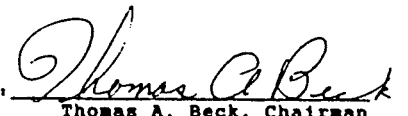
Strike: "and"

Insert: ", "

Following: "5"

Insert: ", and 7"

AND AS AMENDED BE CONCURRED IN

Signed: 

Thomas A. Beck, Chairman

51st Legislature

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HOUSE BILL NO. 707

INTRODUCED BY IVERSON, HARPER, GLASER, RANEY, O'KEEFE,
WALKER, SIMON, HANNAH, GRADY, HARP, MERCER, LYNCH,
BENGTSON, DRISCOLL, YELLOWTAIL, MCLANE, BISHOP, D. BROWN
BY REQUEST OF THE GOVERNOR

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING
OF EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING-OR
MAINTAINING PROVIDING STREAMFLOWS FOR FISH,--WILDLIFE,--OR
RECREATION THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT
OF FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR
DEVELOPING STORAGE FACILITIES; SPECIFYING THAT THE
DEPARTMENT BOARD OF NATURAL RESOURCES AND CONSERVATION SHALL
MAKE A REPORT TO EACH REGULAR SESSION OF THE LEGISLATURE;
REQUIRING THE WATER POLICY COMMITTEE TO COMPLETE A THOROUGH
REPORT BY DECEMBER 1, 1990, THAT INCLUDES RECOMMENDATIONS ON
THE PRACTICAL AND LEGAL WORKABILITY OF THIS ACT; AMENDING
SECTIONS 85-2-102, 85-2-402, AND 85-2-404, MCA; AND
PROVIDING A TERMINATION DATE."

STATEMENT OF INTENT

A statement of intent is provided for this bill in
order to give additional guidance to the board of natural
resources and conservation and the involved state agencies
concerning the review and processing of lease applications
for the purpose of maintaining-or-enhancing PROVIDING stream
flows for fish,--wildlife,--or--recreation THE BENEFIT OF
FISHERIES.

The legislature intends that the board designate stream
reaches eligible for water leasing in areas where leasing is
necessary or--likely-to-be-necessary to enhance-or-maintain
fish,--wildlife,--or--recreation PROVIDE FOR FISHERIES. Upon
receipt of a list of stream reaches from the department of
fish, wildlife, and parks THAT HAVE THE APPROVAL OF THE FISH
AND GAME COMMISSION, the board shall act expeditiously to
designate eligible stream reaches. However, the legislature
also encourages the board to select stream reaches where
leasing has a good chance of success and where all interest
may be satisfied.

The legislature also intends that the review process
for lease applications be thorough and provide ample
opportunity for consideration and input by concerned
persons. As required in [section 4], the process should
involve notice and opportunity for objections and hearing in
the same manner provided for proposed changes in
appropriation rights. The legislature contemplates that the

1 department of fish, wildlife, and parks will meet with
 2 appropriators along each designated stream reach to assess
 3 and consider any concerns before filing applications for
 4 lease authorizations. The legislature also encourages the
 5 department of fish, wildlife, and parks to assemble lease
 6 applications for filing at the same time to minimize costs
 7 to potential objectors. Moreover, the legislature
 8 anticipates that the department of natural resources and
 9 conservation ~~will~~, WITH THE CONSENT OF THE BOARD, SHALL
 10 review the proposed leases for a single stream reach in one
 11 proceeding, though the potential for another set of lease
 12 applications at a future date is recognized.

13 The accurate identification of the stream reach in both
 14 the application and lease authorization is critical to a
 15 successful leasing program. Upon issuance of a lease
 16 authorization with an identified stream reach, the
 17 legislature intends that the entire leased appropriation may
 18 be protected to the extent provided under Title 85, chapter
 19 2, in any part of the stream reach that is above the
 20 lessor's point of diversion. However, only the historical
 21 consumptive use of the right, or a smaller amount if
 22 specified in the lease authorization by the department of
 23 natural resources and conservation, may be protected in any
 24 part of the stream reach that is below the lessor's point of
 25 diversion. Finally, the legislature intends for the lessor

1 to be responsible for taking action, if necessary, to
 2 protect the instream flow amount specified in the lease
 3 authorization, ~~though the lessor and lessee may specify~~
 4 ~~otherwise by contract.~~

5 From a broad policy perspective, the legislature
 6 desires to emphasize that the department of natural
 7 resources and conservation should, WITH THE CONSENT OF THE
 8 BOARD, SHALL consider and, if potentially feasible,
 9 recommend supplemental or alternative strategies that
 10 provide long-term solutions to problems that are not or
 11 ~~probably will not be~~ addressed adequately by water leasing
 12 in the board-designated stream reaches. These strategies may
 13 include storage enhancement or development and recharge from
 14 ground water sources.

15
 16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17 Section 1. Section 85-2-102, MCA, is amended to read:

18 "85-2-102. Definitions. Unless the context requires
 19 otherwise, in this chapter the following definitions apply:

20 (1) "Appropriate" means to:

21 (a) divert, impound, or withdraw (including by stock
 22 for stock water) a quantity of water; or

23 (b) in the case of a public agency, to reserve water
 24 in accordance with 85-2-316; or

25 (c) in the case of the department of fish, wildlife,

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1 and parks, to lease water in accordance with [section 4].

2 (2) "Beneficial use", unless otherwise provided,
3 means:

4 (a) a use of water for the benefit of the
5 appropriator, other persons, or the public, including but
6 not limited to agricultural (including stock water),
7 domestic, fish and wildlife, industrial, irrigation, mining,
8 municipal, power, and recreational uses; and

9 (b) a use of water appropriated by the department for
10 the state water leasing program under 85-2-141 and of water
11 leased under a valid lease issued by the department under
12 85-2-141-; AND

13 (C) A USE OF WATER BY THE DEPARTMENT OF FISH,
14 WILDLIFE, AND PARKS PURSUANT TO A LEASE AUTHORIZED UNDER
15 [SECTION 4].

16 (3) "Board" means the board of natural resources and
17 conservation provided for in 2-15-3302.

18 (4) "Certificate" means a certificate of water right
19 issued by the department.

20 (5) "Change in appropriation right" means a change in
21 the place of diversion, the place of use, the purpose of
22 use, or the place of storage.

23 (6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION
24 PROVIDED FOR IN 2-15-3402.

25 {6}{7} "Declaration" means the declaration of an

1 existing right filed with the department under section 8,
2 Chapter 452, Laws of 1973.

3 {7}{8} "Department" means the department of natural
4 resources and conservation provided for in Title 2, chapter
5 15, part 33.

6 {8}{9} "Existing right" means a right to the use of
7 water which would be protected under the law as it existed
8 prior to July 1, 1973.

9 {9}{10} "Groundwater" means any water beneath the land
10 surface or beneath the bed of a stream, lake, reservoir, or
11 other body of surface water, and which is not a part of that
12 surface water.

13 {10}{11} "Permit" means the permit to appropriate
14 issued by the department under 85-2-301 through 85-2-303 and
15 85-2-306 through 85-2-314.

16 {11}{12} "Person" means an individual, association,
17 partnership, corporation, state agency, political
18 subdivision, the United States or any agency thereof, or any
19 other entity.

20 {12}{13} "Political subdivision" means any county,
21 incorporated city or town, public corporation, or district
22 created pursuant to state law or other public body of the
23 state empowered to appropriate water but not a private
24 corporation, association, or group.

25 {13}{14} "Waste" means the unreasonable loss of water

1 through the design or negligent operation of an
2 appropriation or water distribution facility or the
3 application of water to anything but a beneficial use.

4 ~~(14)~~(15) "Water" means all water of the state, surface
5 and subsurface, regardless of its character or manner of
6 occurrence, including but not limited to geothermal water,
7 diffuse surface water, and sewage effluent.

8 ~~(15)~~(16) "Water division" means a drainage basin as
9 defined in 3-7-102.

10 ~~(16)~~(17) "Water judge" means a judge as provided for in
11 Title 3, chapter 7.

12 ~~(17)~~(18) "Water master" means a master as provided for
13 in Title 3, chapter 7.

14 ~~(18)~~(19) "Well" means any artificial opening or
15 excavation in the ground, however made, by which groundwater
16 is sought or can be obtained or through which it flows under
17 natural pressures or is artificially withdrawn."

18 **Section 2.** Section 85-2-402, MCA, is amended to read:
19 "85-2-402. Changes in appropriation rights. (1) An
20 appropriator may not make a change in an appropriation right
21 except as permitted under this section and with the approval
22 of the department or, if applicable, of the legislature.

23 (2) Except as provided in subsections (3) through (5),
24 the department shall approve a change in appropriation right
25 if the appropriator proves by substantial credible evidence

1 that the following criteria are met:

2 (a) The proposed use will not adversely affect the
3 water rights of other persons or other planned uses or
4 developments for which a permit has been issued or for which
5 water has been reserved.

6 (b) The Except for a lease authorization pursuant to
7 [section 4] that does not require appropriation works, the
8 proposed means of diversion, construction, and operation of
9 the appropriation works are adequate.

10 (c) The proposed use of water is a beneficial use.

11 (3) The department may not approve a change in purpose
12 of use or place of use of an appropriation of 4,000 or more
13 acre-feet of water a year and 5.5 or more cubic feet per
14 second of water unless the appropriator proves by
15 substantial credible evidence that:

16 (a) the criteria in subsection (2) are met;

17 (b) the proposed change is a reasonable use. A
18 finding of reasonable use must be based on a consideration
19 of:

20 (i) the existing demands on the state water supply, as
21 well as projected demands of water for future beneficial
22 purposes, including municipal water supplies, irrigation
23 systems, and minimum streamflows for the protection of
24 existing water rights and aquatic life;

25 (ii) the benefits to the applicant and the state;

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(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water

rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

1 department and, if applicable, the legislature shall
2 consider the following factors:

3 (i) whether there are present or projected water
4 shortages within the state of Montana;

5 (ii) whether the water that is the subject of the
6 proposed change in appropriation might feasibly be
7 transported to alleviate water shortages within the state of
8 Montana;

9 (iii) the supply and sources of water available to the
10 applicant in the state where the applicant intends to use
11 the water; and

12 (iv) the demands placed on the applicant's supply in
13 the state where the applicant intends to use the water.

14 (d) When applying for a change in appropriation right
15 to withdraw and transport water for use outside the state,
16 the applicant shall submit to and comply with the laws of
17 the state of Montana governing the appropriation and use of
18 water.

19 (6) For any application for a change in appropriation
20 right involving 4,000 or more acre-feet of water a year and
21 5.5 or more cubic feet per second of water, the department
22 shall give notice of the proposed change in accordance with
23 85-2-307 and shall hold one or more hearings in accordance
24 with 85-2-309 prior to its approval or denial of the
25 proposed change. The department shall provide notice and may

1 hold one or more hearings upon any other proposed change if
2 it determines that such a change might adversely affect the
3 rights of other persons.

4 (7) The department or the legislature, if applicable,
5 may approve a change subject to such terms, conditions,
6 restrictions, and limitations as it considers necessary to
7 satisfy the criteria of this section, including limitations
8 on the time for completion of the change. The department
9 may extend time limits specified in the change approval
10 under the applicable criteria and procedures of 85-2-312(3).

11 (8) If a change is not completed as approved by the
12 department or legislature or if the terms, conditions,
13 restrictions, and limitations of the change approval are not
14 complied with, the department may, after notice and
15 opportunity for hearing, require the appropriator to show
16 cause why the change approval should not be modified or
17 revoked. If the appropriator fails to show sufficient cause,
18 the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the
20 department must be sent to the applicant, and a duplicate
21 must be kept in the office of the department in Helena.

22 (10) A person holding an issued permit or change
23 approval that has not been perfected may change the place of
24 diversion, place of use, purpose of use, or place of storage
25 by filing an application for change pursuant to this

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1 section.

2 (11) A change in appropriation right contrary to the
3 provisions of this section is invalid. No An officer,
4 agent, agency, or employee of the state may not knowingly
5 permit, aid, or assist in any manner such an unauthorized
6 change in appropriation right. No A person or corporation
7 may not, directly or indirectly, personally or through an
8 agent, officer, or employee, attempt to change an
9 appropriation right except in accordance with this section."

10 Section 3. Section 85-2-404, MCA, is amended to read:

11 *85-2-404. Abandonment of appropriation right. (1) If
12 an appropriator ceases to use all or a part of his
13 appropriation right with the intention of wholly or
14 partially abandoning the right or if he ceases using his
15 appropriation right according to its terms and conditions
16 with the intention of not complying with those terms and
17 conditions, the appropriation right shall, to that extent,
18 be deemed considered abandoned and shall immediately expire.

19 (2) If an appropriator ceases to use all or part of
20 his appropriation right or ceases using his appropriation
21 right according to its terms and conditions for a period of
22 10 successive years and there was water available for his
23 use, there ~~shall--be~~ is a prima facie presumption that the
24 appropriator has abandoned his right in whole or for the
25 part not used.

1 (3) If an appropriator ceases to use all or part of
2 his appropriation right because the land to which the water
3 is applied to a beneficial use is contracted under a state
4 or federal conservation set-aside program:

5 (a) the set-aside and resulting reduction in use of
6 the appropriation right does not represent an intent by the
7 appropriator to wholly or partially abandon the
8 appropriation right or to not comply with the terms and
9 conditions attached to the right; and

10 (b) the period of nonuse that occurs for part or all
11 of the appropriation right as a result of the contract may
12 not create or may not be added to any previous period of
13 nonuse to create a prima facie presumption of abandonment

14 (4) The lease of an existing right pursuant to
15 [section 4] does not constitute an abandonment by the lessor
16 or serve as evidence that could be used to establish
17 abandonment by the lessor of any part of the right.

18 ~~(4)~~(5) Subsections (1) and (2) do not apply
19 existing rights until they have been determined
20 accordance with part 2 of this chapter."

21 NEW SECTION. Section 4. Leases to enhance or maintain
22 streamflows for fish, wildlife, or recreation
23 BENEFIT OF FISHERIES -- department authorization. (1)
24 AFTER JULY 1, 1991, THE department of fish, wildlife,
25 parks, WITH THE CONSENT OF THE COMMISSION, may lease

1 existing rights for the purpose of maintaining-or--enhancing
 2 PROVIDING streamflows for fish, wildlife, or recreation THE
 3 BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW PERIODS in
 4 stream reaches determined eligible by the board pursuant to
 5 [section 5]. This section is the exclusive means by which
 6 appropriations may be changed to an instream flow purpose.

7 (2) The department, WITH THE CONSENT OF THE BOARD,
 8 shall authorize a lease of an existing right for the purpose
 9 of maintaining-or-enhancing PROVIDING streamflows for fish,
 10 wildlife, or recreation THE BENEFIT OF FISHERIES DURING
 11 CRITICAL LOW FLOW PERIODS in an eligible stream reach if the
 12 applicant submits a completed application and meets the
 13 requirements of 85-2-402.

14 (3) The application for a lease authorization must
 15 include specific information on the length and location of
 16 the stream reach in which the streamflow will-be--maintained
 17 or--enhanced MUST BE PROVIDED and must provide INCLUDE a
 18 detailed streamflow measuring plan that describes the points
 19 where and the manner in which the streamflow will MUST be
 20 measured.

21 (4) The maximum quantity of water that may be leased
 22 is the amount historically diverted by the lessor. However,
 23 OF THE AMOUNT LEASED, only the amount historically consumed
 24 by the lessor LESSOR'S CROP, IF APPLICABLE, AND EXCLUDING
 25 WATER USED AS RECHARGE OR RETURN FLOW, or a smaller amount

1 if specified by the department in the lease authorization,
 2 may be used to enhance-or-maintain PROVIDE streamflows below
 3 the lessor's point of diversion. THE LEASE MUST TAKE INTO
 4 ACCOUNT THE HISTORICAL USE OF THE WATER RIGHT, INCLUDING BUT
 5 NOT LIMITED TO THE USUAL SHUTOFF OF ALL OR A PORTION OF THE
 6 WATER SUBJECT TO THE WATER RIGHT DUE TO NORMAL IRRIGATION
 7 PRACTICES, HARVESTING, NORMAL CLIMATE CONDITIONS, AND
 8 COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

9 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS
 10 THE RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT
 11 A PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
 12 EXISTING WATER RIGHTS. THE-DEPARTMENT-OF-FISH-WILDLIFE-AND
 13 PARKS--SHALL--PAY--THE--COST--INCLUDING--REASONABLE--ATTORNEY
 14 FEE--FOR--ANY--APPROPRIATOR--WHO--SUCCESSFULLY--OBJECTS--TO--A
 15 PROPOSED-DEPARTMENT-OF-FISH-WILDLIFE-AND-PARKS-LEASE.

16 (5)(6) The lease may not be issued for a term of more
 17 than 10 years but may be renewed for up to 10 years per
 18 renewal upon notification to the department. Upon receiving
 19 notice of a lease renewal, the department shall notify other
 20 appropriators potentially affected by the lease and shall
 21 allow 30 days for submission of new evidence of adverse
 22 effects to other water rights. A lease authorization is not
 23 required for a renewal unless an appropriator, other than an
 24 appropriator described in subsection (9) (10), submits
 25 evidence of adverse effects to his rights that has not been

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considered previously. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS SECTION.

(6)(7) During the term of the original lease, the department, WITH THE CONSENT OF THE BOARD, may modify or revoke the lease authorization if an appropriator, other than an appropriator described in subsection (9)(10), proves by substantial--credible SUBSTANTIAL CREDIBLE A PREPONDERANCE--OF--THE evidence that his water right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS SECTION.

(7)(8) The priority of appropriation for a lease under this section is the same as the priority of appropriation of the right that is leased.

(8)(9) Neither a change in appropriation right nor any other authorization is required for the reversion of the appropriation right to the lessor's previous use.

(9)(10) A person issued a water use permit with a priority of appropriation after the date of filing of an application for a lease authorization under this section may not object to the exercise of the lease according to its terms, the renewal of the lease, or the reversion of the appropriation right to the lessor according to the lessor's previous use.

(10)(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR PROVIDING PERSONNEL TO MEASURE STREAMFLOW ACCORDING TO THE MEASURING PLAN SUBMITTED UNDER THIS SECTION.

NEW SECTION. Section 5. Board designation of eligible stream reaches. (1) The department of fish, wildlife, and parks, in-consultation-with-the-department WITH THE CONSENT OF THE COMMISSION, may apply to the board for designation of stream reaches for which water leasing to maintain enhance PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to [section 4] only if it finds that water leasing is necessary or is--likely--to--be--necessary

maintain-or-enhance-fish,--wildlife,--or--recreation PROVIDE
FOR FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR
LEASING, THE BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE
AN ANALYSIS CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE
CRITICAL LOW FLOWS IN THE STREAM REACH ARE FEASIBLE. LONGER
TERM SOLUTIONS TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT
OR DEVELOPMENT AND RECHARGE FROM GROUND WATER SOURCES. THE
PREPARATION OF OR RECOMMENDATIONS RESULTING FROM THE
ANALYSIS MAY NOT PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION
OR IMPLEMENTATION OF LEASES ON THE STREAM REACH AS PROVIDED
IN (SECTION 4).

(3)(4) The board may designate no more than 10 stream
reaches in the state where water leasing pursuant to
[section 4] may occur.

NEW SECTION. SECTION 6. Contributions for leasing
appropriation rights OR DEVELOPING STORAGE FACILITIES. (1)
The department may accept contributions from public or
private entities for the purpose of:

(A) leasing appropriation rights to maintain--or
enhance PROVIDE instream flows for fish,--wildlife,--or
recreation--purposes THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN--OR
ENHANCE PROVIDE STREAMFLOWS FOR-FISH,--WILDLIFE,--RECREATION,
AND-OTHER-PURPOSES.

(2) Any contributions accepted by the department under
this section must be deposited in the fish and wildlife
mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under
this-section SUBSECTION (1)(A) and deposited in the fish and
wildlife mitigation trust fund EXCLUSIVELY to lease existing
rights for the purpose of maintaining-or-enhancing PROVIDING
instream flows for--fish,--wildlife,--or--recreation UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT
TO 87-1-614.

(4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE
FACILITIES TO MAINTAIN-OR-ENHANCE PROVIDE STREAMFLOWS FOR
FISH,--WILDLIFE,--RECREATION,--AND--OTHER-PURPOSES UNLESS AN
EXPENDITURE FOR OTHER PURPOSES IS AUTHORIZED PURSUANT TO
87-1-614.

NEW SECTION. SECTION 7. REPORT TO THE LEGISLATURE --
BY THE DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT
TO EACH REGULAR SESSION OF THE LEGISLATURE AS TO THE
OPERATION OF [THIS ACT].

NEW SECTION. SECTION 8. REPORT TO LEGISLATURE BY
WATER POLICY COMMITTEE. (1) THE WATER POLICY COMMITTEE, IN
COOPERATION WITH THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,

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SHALL CONDUCT AND COORDINATE A STUDY THAT, AT A MINIMUM:

(A) IDENTIFIES A RANGE OF WATER LEASING ALTERNATIVES THAT MAY BE CONSIDERED IN DEVELOPING INSTREAM WATER LEASING LEGISLATION;

(B) DEVELOPS CRITERIA FOR SELECTING STREAM REACHES AND EVALUATES AND IDENTIFIES FIVE STREAM REACHES WHERE WATER LEASING MAY BE A FEASIBLE ALTERNATIVE;

(C) EVALUATES AND PURSUES OPPORTUNITIES FOR VOLUNTARY WATER LEASING IN THE IDENTIFIED STREAM REACHES;

(D) PROVIDES THE FOLLOWING DATA FOR EACH OF THE IDENTIFIED STREAM REACHES:

(I) THE LENGTH OF THE STREAM REACH AND HOW IT IS DETERMINED;

(II) TECHNICAL METHODS AND DATA TO BE USED TO DETERMINE CRITICAL STREAMFLOW OR VOLUME NEEDED TO PRESERVE FISHERIES;

(III) LEGAL STANDARDS AND TECHNICAL DATA THAT MAY BE USED TO DETERMINE AND SUBSTANTIATE THE AMOUNT OF WATER AVAILABLE FOR INSTREAM FLOWS THROUGH LEASING OF EXISTING RIGHTS;

(IV) CONTRACTUAL PARAMETERS, CONDITIONS, AND OTHER STEPS THAT MAY BE TAKEN TO ENSURE THAT LEASES AND LEASE AUTHORIZATIONS IN NO WAY HARM OTHER APPROPRIATORS, PARTICULARLY IF THE STREAM IS ONE THAT EXPERIENCES NATURAL DEWATERING;

(V) METHODS AND TECHNICAL MEANS THAT WOULD BE USED TO

MONITOR USE OF WATER UNDER THE LEASES;

(VI) LEGAL IMPLICATIONS THAT WATER LEASING WOULD PRESENT FOR APPROPRIATORS HOLDING EXISTING RIGHTS TO WATER WITHIN AND BELOW THE STREAM REACH;

(VII) COMPARISON OF THE COSTS AND BENEFITS OF WATER LEASING WITH THE COSTS AND BENEFITS OF ADDITIONAL STORAGE FOR THE STREAM REACH;

(VIII) SOCIOECONOMIC IMPACTS THAT WATER LEASING WOULD HAVE ON LOCAL COMMUNITIES; AND

(IX) FISCAL IMPACTS THAT WATER LEASING WOULD HAVE ON THE STATE OF MONTANA;

(E) BASED ON THE DATA PROVIDED UNDER SUBSECTION (1)(D), DEVELOPS A COMPLETE MODEL OF A POSSIBLE WATER LEASE AND LEASE AUTHORIZATION THAT INCLUDES A STEP-BY-STEP EXPLANATION OF THE PROCESS FROM INITIATION TO COMPLETION.

(2) THE REPORT MUST BE COMPLETED BY DECEMBER 1, 199

NEW SECTION. Section 9. Extension of authority. A existing authority to make rules on the subject of provisions of [this act] is extended to the provisions [this act].

NEW SECTION. Section 10. Codification instructions. (1) [Sections 4 and, 5, AND 7] are intended to be codified as an integral part of Title 85, chapter 2, part 4, and provisions of Title 85, chapter 2, part 4, apply [sections 4 and, 5, AND 7].

(2) [Section 6] is intended to be codified as an integral part of Title 87, chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to [section 6].

NEW SECTION. Section 11. Termination. [This act] terminates ~~October-17-1999~~ JUNE 30, 1991.

-End-

Gray House Bill No. 707 -- Unofficial BILL NO. HB 707
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1 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR LEASING OF
2 EXISTING WATER RIGHTS FOR THE PURPOSE OF ENHANCING OR
3 ~~MAINTAINING~~ PROVIDING STREAMFLOWS FOR FISH, WILDLIFE, OR
4 ~~RECREATION~~ THE BENEFIT OF FISHERIES DURING CRITICAL LOW FLOW
5 PERIODS IN STREAM REACHES DESIGNATED BY THE BOARD OF NATURAL
6 RESOURCES AND CONSERVATION; SPECIFYING THAT THE DEPARTMENT OF
7 FISH, WILDLIFE, AND PARKS IS THE LESSEE AND ALLOWING THE
8 DEPARTMENT TO ACCEPT CONTRIBUTIONS FROM PUBLIC OR PRIVATE
9 ENTITIES FOR THE PURPOSE OF ACQUIRING LEASES OR FOR DEVELOPING
10 STORAGE FACILITIES; SPECIFYING THAT THE DEPARTMENT BOARD OF
11 NATURAL RESOURCES AND CONSERVATION SHALL MAKE A REPORT TO
12 EACH REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 85-
13 2-102, 85-2-402, AND 85-2-404, MCA; AND PROVIDING A TERMINATION DATE."

14
15

16 STATEMENT OF INTENT

17 A statement of intent is provided for this bill in order to give additional
18 guidance to the board of natural resources and conservation and the involved
19 state agencies concerning the review and processing of lease applications for
20 the purpose of ~~maintaining or enhancing~~ PROVIDING stream flows for fish;
21 ~~wildlife, or recreation~~ THE BENEFIT OF FISHERIES.

22 The legislature intends that the board designate stream reaches eligible for
23 water leasing in areas where leasing is necessary ~~or likely to be necessary~~ to
24 ~~enhance or maintain fish, wildlife, or recreation~~ PROVIDE FOR FISHERIES.

25 Upon receipt of a list of stream reaches from the department of fish, wildlife,
26 and parks THAT HAVE THE APPROVAL OF THE FISH AND GAME
27 COMMISSION, the board shall act expeditiously to designate eligible stream
28 reaches. However, the legislature also encourages the board to select stream
29 reaches where leasing has a good chance of success and where all interests
30 may be satisfied.

31 The legislature also intends that the review process for lease applications be
32 thorough and provide ample opportunity for consideration and input by concerned
33 persons. As required in [section 4], the process should involve notice and
34 opportunity for objections and hearing in the same manner provided for proposed

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1 changes in appropriation rights. The legislature contemplates that the department
2 of fish, wildlife, and parks will meet with appropriators along each designated
3 stream reach to assess and consider any concerns before filing applications for
4 lease authorizations. The legislature also encourages the department of fish,
5 wildlife, and parks to assemble lease applications for filing at the same time to
6 minimize costs to potential objectors. Moreover, the legislature anticipates that
7 the department of natural resources and conservation ~~will~~ WITH THE
8 CONSENT OF THE BOARD, SHALL review the proposed leases for a single
9 stream reach in one proceeding, though the potential for another set of lease
10 applications at a future date is recognized.

11 The accurate identification of the stream reach in both the application and
12 lease authorization is critical to a successful leasing program. Upon issuance of
13 a lease authorization with an identified stream reach, the legislature intends that
14 the entire leased appropriation may be protected to the extent provided under
15 Title 85, chapter 2, in any part of the stream reach that is above the lessor's
16 point of diversion. However, only the historical consumptive use of the right, or a
17 smaller amount if specified in the lease authorization by the department of
18 natural resources and conservation, may be protected in any part of the stream
19 reach that is below the lessor's point of diversion. Finally, the legislature intends
20 for the lessor to be responsible for taking action, if necessary, to protect the
21 instream flow amount specified in the lease authorization, ~~though the lessor and~~
22 ~~lessee may specify otherwise by contract.~~

23 From a broad policy perspective, the legislature desires to emphasize that
24 the department of natural resources and conservation ~~should~~ WITH THE
25 CONSENT OF THE BOARD, SHALL consider and, if potentially feasible,
26 recommend supplemental or alternative strategies that provide long-term solutions
27 to problems that are not ~~or probably will not be~~ addressed adequately by water
28 leasing in the board-designated stream reaches. These strategies may include
29 storage enhancement or development and recharge from ground water sources.
30

31 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

32 Section 1. Section 85-2-102, MCA, is amended to read:

33 "85-2-102. Definitions. Unless the context requires otherwise, in this chapter
34 the following definitions apply:

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(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water; or

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with [section 4].

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; AND

(C) A USE OF WATER BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS PURSUANT TO A LEASE AUTHORIZED UNDER [SECTION 4].

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(6)~~(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(7)~~(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(9)~~(10) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department

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1 under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

2 ~~(11)~~(12) "Person" means an individual, association, partnership, corporation,
3 state agency, political subdivision, the United States or any agency thereof, or
4 any other entity.

5 ~~(12)~~(13) "Political subdivision" means any county, incorporated city or town,
6 public corporation, or district created pursuant to state law or other public body
7 of the state empowered to appropriate water but not a private corporation,
8 association, or group.

9 ~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or
10 negligent operation of an appropriation or water distribution facility or the
11 application of water to anything but a beneficial use.

12 ~~(14)~~(15) "Water" means all water of the state, surface and subsurface,
13 regardless of its character or manner of occurrence, including but not limited to
14 geothermal water, diffuse surface water, and sewage effluent.

15 ~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

16 ~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

17 ~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter

18 7.

19 ~~(18)~~(19) "Well" means any artificial opening or excavation in the ground,
20 however made, by which groundwater is sought or can be obtained or through
21 which it flows under natural pressures or is artificially withdrawn."

22 Section 2. Section 85-2-402, MCA, is amended to read:

23 "85-2-402. Changes in appropriation rights. (1) An appropriator may not
24 make a change in an appropriation right except as permitted under this section
25 and with the approval of the department or, if applicable, of the legislature.

26 (2) Except as provided in subsections (3) through (5), the department shall
27 approve a change in appropriation right if the appropriator proves by substantial
28 credible evidence that the following criteria are met:

29 (a) The proposed use will not adversely affect the water rights of other
30 persons or other planned uses or developments for which a permit has been
31 issued or for which water has been reserved.

32 (b) The Except for a lease authorization pursuant to [section 4] that does
33 not require appropriation works, the proposed means of diversion, construction,
34 and operation of the appropriation works are adequate.

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1 (c) The proposed use of water is a beneficial use.

2 (3) The department may not approve a change in purpose of use or place
3 of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5
4 or more cubic feet per second of water unless the appropriator proves by
5 substantial credible evidence that:

6 (a) the criteria in subsection (2) are met;

7 (b) the proposed change is a reasonable use. A finding of reasonable use
8 must be based on a consideration of:

9 (i) the existing demands on the state water supply, as well as projected
10 demands of water for future beneficial purposes, including municipal water
11 supplies, irrigation systems, and minimum streamflows for the protection of
12 existing water rights and aquatic life;

13 (ii) the benefits to the applicant and the state;

14 (iii) the effects on the quantity and quality of water for existing uses in the
15 source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for
17 which application has been made;

18 (v) the effects on private property rights by any creation of or contribution to
19 saline seep; and

20 (vi) the probable significant adverse environmental impacts of the proposed
21 use of water as determined by the department pursuant to Title 75, chapter 1,
22 or Title 75, chapter 20.

23 (4) The department may not approve a change in purpose of use or place
24 of use for a diversion that results in 4,000 or more acre-feet of water a year
25 and 5.5 or more cubic feet per second of water being consumed unless:

26 (a) the applicant proves by clear and convincing evidence and the
27 department finds that the criteria in subsections (2) and (3) are met; and

28 (b) the department then petitions the legislature and the legislature affirms
29 the decision of the department after one or more public hearings.

30 (5) (a) The state of Montana has long recognized the importance of
31 conserving its public waters and the necessity to maintain adequate water
32 supplies for the state's water requirements, including requirements for reserved
33 water rights held by the United States for federal reserved lands and in trust for
34 the various Indian tribes within the state's boundaries. Although the state of

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1 Montana also recognizes that, under appropriate conditions, the out-of-state
2 transportation and use of its public waters are not in conflict with the public
3 welfare of its citizens or the conservation of its waters, the following criteria must
4 be met before out-of-state use may occur:

5 (b) The department and, if applicable, the legislature may not approve a
6 change in appropriation right for the withdrawal and transportation of appropriated
7 water for use outside the state unless the appropriator proves by clear and
8 convincing evidence and, if applicable, the legislature approves after one or
9 more public hearings that:

10 (i) depending on the volume of water diverted or consumed, the applicable
11 criteria and procedures of subsection (2) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water
13 conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the
15 public welfare of the citizens of Montana.

16 (c) In determining whether the appropriator has proved by clear and
17 convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii)
18 will be met, the department and, if applicable, the legislature shall consider the
19 following factors:

20 (i) whether there are present or projected water shortages within the state of
21 Montana;

22 (ii) whether the water that is the subject of the proposed change in
23 appropriation might feasibly be transported to alleviate water shortages within the
24 state of Montana;

25 (iii) the supply and sources of water available to the applicant in the state
26 where the applicant intends to use the water; and

27 (iv) the demands placed on the applicant's supply in the state where the
28 applicant intends to use the water.

29 (d) When applying for a change in appropriation right to withdraw and
30 transport water for use outside the state, the applicant shall submit to and
31 comply with the laws of the state of Montana governing the appropriation and
32 use of water.

33 (6) For any application for a change in appropriation right involving 4,000 or
34 more acre-feet of water a year and 5.5 or more cubic feet per second of water,

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1 the department shall give notice of the proposed change in accordance with 85-
2 2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to
3 its approval or denial of the proposed change. The department shall provide
4 notice and may hold one or more hearings upon any other proposed change if
5 it determines that ~~such~~ a change might adversely affect the rights of other
6 persons.

7 (7) The department or the legislature, if applicable, may approve a change
8 subject to ~~such~~ terms, conditions, restrictions, and limitations as it considers
9 necessary to satisfy the criteria of this section, including limitations on the time
10 for completion of the change. The department may extend time limits specified
11 in the change approval under the applicable criteria and procedures of 85-2-
12 312(3).

13 (8) If a change is not completed as approved by the department or
14 legislature or if the terms, conditions, restrictions, and limitations of the change
15 approval are not complied with, the department may, after notice and opportunity
16 for hearing, require the appropriator to show cause why the change approval
17 should not be modified or revoked. If the appropriator fails to show sufficient
18 cause, the department may modify or revoke the change approval.

19 (9) The original of a change approval issued by the department must be
20 sent to the applicant, and a duplicate must be kept in the office of the
21 department in Helena.

22 (10) A person holding an issued permit or change approval that has not
23 been perfected may change the place of diversion, place of use, purpose of
24 use, or place of storage by filing an application for change pursuant to this
25 section.

26 (11) A change in appropriation right contrary to the provisions of this section
27 is invalid. ~~No~~ An officer, agent, agency, or employee of the state may not
28 knowingly permit, aid, or assist in any manner ~~such~~ an unauthorized change in
29 appropriation right. ~~No~~ A person or corporation may not, directly or indirectly,
30 personally or through an agent, officer, or employee, attempt to change an
31 appropriation right except in accordance with this section."

32 Section 3. Section 85-2-404, MCA, is amended to read:

33 "85-2-404. Abandonment of appropriation right (1) If an appropriator ceases
34 to use all or a part of his appropriation right with the intention of wholly or

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1 partially abandoning the right or if he ceases using his appropriation right
2 according to its terms and conditions with the intention of not complying with
3 those terms and conditions, the appropriation right shall, to that extent, be
4 deemed considered abandoned and shall immediately expire.

5 (2) If an appropriator ceases to use all or part of his appropriation right or
6 ceases using his appropriation right according to its terms and conditions for a
7 period of 10 successive years and there was water available for his use, there
8 shall be is a prima facie presumption that the appropriator has abandoned his
9 right in whole or for the part not used.

10 (3) If an appropriator ceases to use all or part of his appropriation right
11 because the land to which the water is applied to a beneficial use is contracted
12 under a state or federal conservation set-aside program:

13 (a) the set-aside and resulting reduction in use of the appropriation right
14 does not represent an intent by the appropriator to wholly or partially abandon
15 the appropriation right or to not comply with the terms and conditions attached
16 to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right
18 as a result of the contract may not create or may not be added to any
19 previous period of nonuse to create a prima facie presumption of abandonment.

20 (4) The lease of an existing right pursuant to [section 4] does not constitute
21 an abandonment by the lessor or serve as evidence that could be used to
22 establish an abandonment by the lessor of any part of the right.

23 (4)(5) Subsections (1) and (2) do not apply to existing rights until they have
24 been determined in accordance with part 2 of this chapter."

25 NEW SECTION. Section 4. Leases to ~~enhance or maintain~~ PROVIDE
26 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES -
27 department authorization. (1) The AFTER JULY 1, 1991, THE department of fish,
28 wildlife, and parks WITH THE CONSENT OF THE COMMISSION, may lease
29 existing rights for the purpose of ~~maintaining or enhancing~~ PROVIDING
30 streamflows for fish, wildlife, or recreation THE BENEFIT OF FISHERIES DURING
31 CRITICAL LOW FLOW PERIODS in stream reaches determined eligible by the
32 board pursuant to [section 5]. This section is the exclusive means by which
33 appropriations may be changed to an instream flow purpose.

34 (2) The department WITH THE CONSENT OF THE BOARD, shall authorize

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1 a lease of an existing right for the purpose of ~~maintaining or enhancing~~
2 PROVIDING streamflows for fish, wildlife, or recreation THE BENEFIT OF
3 FISHERIES DURING CRITICAL LOW FLOW PERIODS in an eligible stream
4 reach if the applicant submits a completed application and meets the
5 requirements of 85-2-402.

6 (3) The application for a lease authorization must include specific information
7 on the length and location of the stream reach in which the streamflow ~~will be~~
8 ~~maintained or enhanced~~ MUST BE PROVIDED and must provide INCLUDE a
9 detailed streamflow measuring plan that describes the points where and the
10 manner in which the streamflow ~~will~~ MUST be measured.

11 (4) The maximum quantity of water that may be leased is the amount
12 historically diverted by the lessor. However, OF THE AMOUNT LEASED, only the
13 amount historically consumed by the lessor LESSOR'S CROP, IF APPLICABLE,
14 AND EXCLUDING WATER USED AS RECHARGE OR RETURN FLOW, or a
15 smaller amount if specified by the department in the lease authorization, may be
16 used to ~~enhance or maintain~~ PROVIDE streamflows below the lessor's point of
17 diversion. THE LEASE MUST TAKE INTO ACCOUNT THE HISTORICAL USE OF
18 THE WATER RIGHT, INCLUDING BUT NOT LIMITED TO THE USUAL SHUTOFF
19 OF ALL OR A PORTION OF THE WATER SUBJECT TO THE WATER RIGHT
20 DUE TO NORMAL IRRIGATION PRACTICES, HARVESTING, NORMAL CLIMATE
21 CONDITIONS, AND COOPERATIVE PRACTICES WITH OTHER IRRIGATORS.

22 (5) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS HAS THE
23 RESPONSIBILITY TO PROVE TO THE BOARD UNDER 85-2-402 THAT A
24 PROPOSED LEASE AUTHORIZATION DOES NOT ADVERSELY AFFECT
25 EXISTING WATER RIGHTS. THE DEPARTMENT OF FISH, WILDLIFE, AND
26 PARKS SHALL PAY THE COST, INCLUDING REASONABLE ATTORNEY FEES,
27 FOR ANY APPROPRIATOR WHO SUCCESSFULLY OBJECTS TO A PROPOSED
28 DEPARTMENT OF FISH, WILDLIFE, AND PARKS LEASE.

29 (5)(6) The lease may not be issued for a term of more than 10 years but
30 may be renewed for up to 10 years per renewal upon notification to the
31 department. Upon receiving notice of a lease renewal, the department shall notify
32 other appropriators potentially affected by the lease and shall allow 30 days for
33 submission of new evidence of adverse effects to other water rights. A lease
34 authorization is not required for a renewal unless an appropriator, other than an

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1 appropriator described in subsection ~~(9)~~(10), submits evidence of adverse effects
2 to his rights that has not been considered previously. IF AN APPROPRIATOR
3 PROVES ADVERSE EFFECTS TO HIS WATER RIGHTS, THE DEPARTMENT OF
4 FISH, WILDLIFE, AND PARKS SHALL PAY TO THE APPROPRIATOR AN
5 AMOUNT EQUAL TO THE DAMAGES THAT RESULTED FROM EXERCISE OF
6 ITS LEASE AND THE COSTS OF PROVING THE ADVERSE EFFECTS,
7 INCLUDING REASONABLE ATTORNEY FEES AND COURT COSTS. THIS
8 PROVISION APPLIES ONLY TO WATER LEASES ENTERED INTO UNDER THIS
9 SECTION.

10 ~~(6)~~(7) During the term of the original lease, the department, WITH THE
11 CONSENT OF THE BOARD, may modify or revoke the lease authorization if an
12 appropriator, other than an appropriator described in subsection ~~(9)~~(10), proves
13 by ~~substantial-credible~~ A PREPONDERANCE OF THE evidence that his water
14 right is adversely affected. IF AN APPROPRIATOR PROVES ADVERSE EFFECTS
15 TO HIS WATER RIGHTS, THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
16 SHALL PAY TO THE APPROPRIATOR AN AMOUNT EQUAL TO THE DAMAGES
17 THAT RESULTED FROM EXERCISE OF ITS LEASE AND THE COSTS OF
18 PROVING THE ADVERSE EFFECTS, INCLUDING REASONABLE ATTORNEY
19 FEES AND COURT COSTS. THIS PROVISION APPLIES ONLY TO WATER
20 LEASES ENTERED INTO UNDER THIS SECTION.

21 ~~(7)~~(8) The priority of appropriation for a lease under this section is the
22 same as the priority of appropriation of the right that is leased.

23 ~~(8)~~(9) Neither a change in appropriation right nor any other authorization is
24 required for the reversion of the appropriation right to the lessor's previous use.

25 ~~(9)~~(10) A person issued a water use permit with a priority of appropriation
26 after the date of filing of an application for a lease authorization under this
27 section may not object to the exercise of the lease according to its terms, the
28 renewal of the lease, or the reversion of the appropriation right to the lessor
29 according to the lessor's previous use.

30 ~~(10)~~(11) THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS SHALL PAY
31 ALL COSTS ASSOCIATED WITH INSTALLING MEASURING DEVICES OR
32 PROVIDING PERSONNEL TO MEASURE STREAMFLOWS ACCORDING TO THE
33 MEASURING PLAN SUBMITTED UNDER THIS SECTION.

34 NEW SECTION. Section 5. Board designation of eligible stream reaches.

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(1) The department of fish, wildlife, and parks, ~~in consultation with the department~~
WITH THE CONSENT OF THE COMMISSION, may apply to the board for
designation of stream reaches for which water leasing to ~~maintain or enhance~~
PROVIDE streamflows pursuant to [section 4] may occur.

(2) The board may declare a stream reach eligible for leasing pursuant to
[section 4] only if it finds that water leasing is necessary ~~or is likely to be~~
~~necessary to maintain or enhance fish, wildlife, or recreation~~ PROVIDE FOR
FISHERIES DURING CRITICAL LOW FLOW PERIODS.

(3) UPON DECLARING A STREAM REACH ELIGIBLE FOR LEASING, THE
BOARD SHALL REQUEST THE DEPARTMENT TO PREPARE AN ANALYSIS
CONCERNING WHETHER LONGER TERM SOLUTIONS TO THE CRITICAL LOW
FLows IN THE STREAM REACH ARE FEASIBLE. LONGER TERM SOLUTIONS
TO BE CONSIDERED INCLUDE STORAGE ENHANCEMENT OR DEVELOPMENT
AND RECHARGE FROM GROUND WATER SOURCES. THE PREPARATION OF
OR RECOMMENDATIONS RESULTING FROM THE ANALYSIS MAY NOT
PRECLUDE, INHIBIT, OR DELAY THE NEGOTIATION OR IMPLEMENTATION OF
LEASES ON THE STREAM REACH AS PROVIDED IN [SECTION 4].

~~(3)(4)~~ The board may designate no more than 10 stream reaches in the
state where water leasing pursuant to [section 4] may occur.

NEW SECTION. Section 6. Contributions for leasing appropriation rights
OR DEVELOPING STORAGE FACILITIES. (1) The department may accept
contributions from public or private entities for the purpose of:

(A) leasing appropriation rights to ~~maintain or enhance~~ PROVIDE instream
flows for fish, wildlife, or recreation purposes THE BENEFIT OF FISHERIES; OR

(B) DEVELOPING STORAGE FACILITIES TO MAINTAIN OR ENHANCE
PROVIDE STREAMFLOWS FOR FISH, WILDLIFE, RECREATION, AND OTHER
PURPOSES.

(2) Any contributions accepted by the department under this section must be
deposited in the fish and wildlife mitigation trust fund established in 87-1-611.

(3) The department shall expend money obtained under ~~this section~~
SUBSECTION (1)(A) and deposited in the fish and wildlife mitigation trust fund
EXCLUSIVELY to lease existing rights for the purpose of ~~maintaining or~~
~~enhancing~~ PROVIDING instream flows for fish, wildlife, or recreation UNLESS
EXPENDITURE FOR A DIFFERENT PURPOSE IS AUTHORIZED PURSUANT TO

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1 87-1-614.

2 (4) THE DEPARTMENT SHALL EXPEND MONEY OBTAINED UNDER
3 SUBSECTION (1)(B) AND DEPOSITED IN THE FISH AND WILDLIFE
4 MITIGATION TRUST FUND EXCLUSIVELY TO DEVELOP STORAGE FACILITIES
5 TO MAINTAIN OR ENHANCE PROVIDE STREAMFLOWS FOR FISH, WILDLIFE,
6 RECREATION, AND OTHER PURPOSES UNLESS AN EXPENDITURE FOR
7 OTHER PURPOSES IS AUTHORIZED PURSUANT TO 87-1-614.

8 NEW SECTION. Section 7. REPORT TO THE LEGISLATURE -- BY THE
9 DEPARTMENT BOARD. THE DEPARTMENT BOARD SHALL REPORT TO EACH
10 REGULAR SESSION OF THE LEGISLATURE AS TO THE OPERATION OF [THIS
11 ACT].

12 NEW SECTION. Section 8. Extension of authority. Any existing authority to
13 make rules on the subject of the provisions of [this act] is extended to the
14 provisions of [this act].

15 NEW SECTION. Section 9. Codification instruction. (1) [Sections 4, and 5,
16 AND 7] are intended to be codified as an integral part of Title 85, chapter 2,
17 part 4, and the provisions of Title 85, chapter 2, part 4, apply to [sections 4,
18 and 5, AND 7].

19 (2) [Section 6] is intended to be codified as an integral part of Title 87,
20 chapter 1, part 6, and the provisions of Title 87, chapter 1, part 6, apply to
21 [section 6].

22 NEW SECTION. Section 10. Termination. [This act] terminates October 1,
23 1999.

24 -END-

~~where~~
(e) Upon receipt of an application for a lease from DFWT, PNEC shall publish notice of the application pursuant to the provisions in 85-2-307. Parties who believe they will be adversely affected by a proposed lease may file objection pursuant to section 85-2-308. A lease may not be approved until all objections are resolved.